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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 256

LOUIS E. RODDEWIG, AS CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, ETC., ET AL., PETITIONERS,

vs.

MONTGOMERY WARD AND CO., INCORPORATED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

PETITION FOR CERTIORARI FILED JULY 12, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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[fol. 1]

IN SUPREME COURT OF IOWA, SEPTEMBER TERM, 1939

9-44963

Equity

MONTGOMERY WARD & Co., Incorporated, Appellee,

vs.

LOUIS E. RODDEWIG, D. L. MURROW, and C. F. GREEN, Individually and as Members of the Iowa State Board of Assessment and Review, Appellants

Appeal from District Court of Polk County, Iowa, Honorable John J. Halloran, Judge

Appellant's Abstract of the Record—Filed June 30, 1939

[fol. 2] On the 14th day of March, 1938, the plaintiff, Montgomery Ward & Company, Inc., filed in the District Court of Polk County, Iowa, the following petition in equity:

PETITION

Comes now the plaintiff, Montgomery Ward & Co., Incorporated, and for cause of action alleges as follows:

1. The plaintiff, Montgomery Ward & Co., Incorporated, is a corporation organized under the laws of the State of Illinois, duly licensed to do business in the State of Iowa.

2. The defendants, Louis E. Roddewig, D. L. Murrow, and C. F. Green, are all of the members of the Iowa State Board of Assessment and Review of which the defendant Roddewig is Chairman and the defendant Murrow is Vice Chairman, all of the said defendants residing in the City of Des Moines and County of Polk.

3. The plaintiff operates in the State of Iowa twenty-seven retail stores and has substantial investments therein. The assessed valuation of its tangible property in Iowa for the year 1937 exceeded, to-wit, one million dollars. Plaintiff and its predecessor corporation have been engaged in operating retail stores in the State of Iowa for the past

ten years or more. The sales made by said stores during the year 1937 exceeded, to-wit, eight million dollars.

4. On February 28, 1938, said defendants hereinafter referred to as the Board, caused to be served upon the manager of the plaintiff's store at Des Moines, Iowa, a copy of a Notice and Order, true copies of which are marked Exhibits "A" and "B" respectfully, attached hereto and expressly made a part hereof as fully as if set forth herein.

5. The said Order, Exhibit "B", attached hereto, requires this plaintiff to observe all of the terms of Chapter 198 of the Laws of the 47th General Assembly, hereinafter referred to as the Iowa Use Tax Law; and further orders [fol. 3] that, if by the fifteenth day of March, 1938, this plaintiff is not able to produce evidence of complete compliance with the terms of the said law and of the Order, the sales permit heretofore issued to the plaintiff for the operation of its retail establishments in the State of Iowa will be cancelled.

6. Section 21 of the Iowa Use Tax Law provides that the Defendant Board may revoke the permit issued to retailers by virtue of Section 11 of the Senate File 316, Acts of the 47th General Assembly of the State of Iowa, hereinafter called the Iowa Sales Tax Law, upon a finding by the Board of a failure to comply with any provision of the Iowa Use Tax Law. Plaintiff states that it holds a permit issued under the aforesaid Section 11 of the Iowa Sales Tax Law, that its sole business in the State of Iowa is as a retailer, and that such Section 11 of the Iowa Sales Tax Law makes it unlawful to transact business as a retailer without such permit.

7. The said Order, Exhibit "B", attached hereto further provides that if this plaintiff has not fully complied with the Iowa Use Tax Law by the 15th of March, 1938, the Defendant Board will certify the fact to the Secretary of State with a request that the license of this plaintiff to do business in the State of Iowa be revoked. Section 21 of the Iowa Use Tax Law provides that upon the receipt by the Secretary of State of such a certified finding, the Secretary of State shall revoke the license to do business in the State of Iowa. Such action by the Secretary of State would render it unlawful for the plaintiff to operate any of its

retail stores or otherwise engage in business in the State of Iowa.

8. In addition to the operation of retail stores in the State of Iowa, the plaintiff also is engaged in the business of selling tangible merchandise at retail at Chicago, Illinois; Kansas City, Missouri; and St. Paul, Minnesota, by means of [fol. 4] orders received at its mail order houses at those locations from customers residing in all parts of the Middle West, including the State of Iowa.

9. In connection with the mail order business conducted at Chicago, Kansas City, and St. Paul, the plaintiff circulates, or causes to be circulated, to customers and prospective customers located in all parts of the Middle West, including the State of Iowa, catalogs describing the merchandise offered for sale and instructing such customers and prospective customers how to order this merchandise from the said mail order houses.

10. The plaintiff offers for sale at its said mail order houses at Chicago, Kansas City, and St. Paul, and through its said catalogs, many items of merchandise which are not offered for sale through its retail stores located in the State of Iowa.

11. Plaintiff further states that it has at its St. Paul, Minnesota, Kansas City, Missouri, and Chicago, Illinois, mail order houses received since the passage of the Iowa Use Tax Law, and is now receiving, many orders from Iowa customers; that such orders specify what method of shipment is to be employed; that such orders call for shipment at the expense of such Iowa customers of the merchandise ordered to points within the State of Iowa; and that many such orders have been accepted and are being accepted at the said mail order houses and shipped as instructed to customers within the State of Iowa from the said mail order houses located outside the State of Iowa. Plaintiff further states that its catalogs sent to such Iowa customers clearly indicate that such orders will be shipped from the said mail order houses outside of the State of Iowa and the fact that such shipments will be made from such mail order houses outside of the State of Iowa is known to such customers when their orders are sent to the said mail order [fol. 5] houses. Plaintiff further states that the Board has

never attempted to assess or collect an Iowa sales tax on such sales made in interstate commerce.

12. Plaintiff also operates retail stores in the States of Illinois, Missouri, Nebraska, South Dakota, and Minnesota, in cities and towns adjacent to the State of Iowa. From time to time plaintiff has made, and is making sales of tangible personal property in these retail stores to customers residing in the State of Iowa, and who make known this fact to the plaintiff at the time these sales are made.

13. Section 8 of the Iowa Use Tax Act provides with respect to the sales described above.

"Every retailer maintaining a place of business in this state, * * * shall at the time of making such sales, whether within or without the state, collect the tax imposed by this Act from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the Board, if the Board shall, by regulation, require such receipt. * * *"

14. Section 9 of the Iowa Use Tax Act provides that:

"The Board may, in its discretion, upon application, authorize the collection of the tax herein imposed by any retailer not maintaining a place of business within this state. * * * Such authority and permit may be cancelled when, at any time, the board considers the security inadequate, or that such tax can more effectively be collected from the person using such property in this state."

15. Plaintiff states that there are other mail order houses operated by corporations which are not licensed to do busi- [fol. 6] ness in the State of Iowa which do not maintain a place of business in the State of Iowa which have not been authorized to collect and do not collect the Iowa Use Tax as above provided, and which are in substantial competition with the plaintiff's mail order houses in making sales to residents of Iowa. Plaintiff further states that there are other retail stores not located in the State of Iowa operated by corporations or individuals who do not maintain a place of business in the State of Iowa and who are in competition with plaintiff's retail stores in Minnesota, Illinois, Missouri, and Nebraska in making sales to residents of Iowa.

16. Plaintiff has collected no use tax on sales made as described above. Plaintiff does not maintain any accurate record of individual sales for cash either from its retail stores in the States of Illinois, Missouri, Nebraska, South Dakota, or Minnesota, or at its three mail order houses at Kansas City, St. Paul, and Chicago, nor any records which permit the segregation of such sales to Iowa customers or for use in the State of Iowa from other sales made by such stores and mail order houses. Plaintiff states that the maintenance of such records in such mail order houses and retail stores would be a substantial expense and plaintiff states that such records are not kept by others who operate mail order houses and retail stores in competition with this plaintiff in making such sales to Iowa customers but who do not maintain a place of business in the State of Iowa.

17. Section 3 of the Iowa Use Tax Law provides that:

"The use in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

[fol. 7] 1. Tangible personal property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Senate File 316, Acts of the Forty-seventh General Assembly, and any amendments made or which may hereafter be made thereto."

Plaintiff shows to the court that by the operation of this section all sales in local intra-state commerce consummated in the State of Iowa are exempted from the operation of the Iowa Use Tax Law.

18. Section 27 of the Iowa Use Tax Law provides that:

"If any article of tangible personal property has already been subjected to a tax by any other states in respect to its sale or use in an amount less than the tax imposed by this title, the provisions of this title shall apply, but at a rate measured by the difference only between the rate herein fixed and the rate by which the previous tax upon the sale or use was computed. If such tax imposed in such other state is two per cent (2%) or more, then no tax shall be due on such articles."

Plaintiff further shows to the court that in other states adjoining the State of Iowa taxes are imposed upon the oc-

cupation of retailing measured by the amount of gross sales, and that the incidence of such taxes is upon the transactions of sale even though the sale or use of the property is not subjected to tax.

19. Plaintiff states that retail merchants doing a purely local business in the State of Iowa cannot be compelled by [fol. 8] any provisions of existing law to prepare or issue any such receipts in connection with local instrastate sales as the plaintiff by Section 8 of the Iowa Use Tax Law is subject to be required to issue with respect to its sales in interstate commerce described above. Plaintiff further alleges that the issue of such receipts in each individual case would materially and substantially add to the expense of conducting its interstate commerce described above.

20. Section 11 of the Iowa Use Tax Act provides that:

"The tax herein required to be collected by any retailer pursuant to Sections Eight or Nine hereof, and any tax collected by any retailer pursuant to said sections, shall constitute a debt owed by the retailer to this state."

although the tax in question, as provided in Section 2 of said Act is

"An excise tax * * * imposed on the use in this state of tangible personal property purchased on or after the effective date of this act for use in this state, at the rate of two per cent of the purchase price of such property. Said tax is hereby imposed upon every person using such property within this state until such tax has been paid. * * *"

21. Plaintiff alleges that the Iowa Use Tax Law is unconstitutional in so far as it purports to require the plaintiff to collect a use tax from Iowa customers in connection with its sales in interstate commerce and in other states described above for the following among other reasons, to-wit:

[fol. 9] (a) The requirement that the plaintiff collect such tax and be liable for the amount of such tax directly burdens and restricts the privilege of engaging in interstate commerce, and is a violation of Section 8 of Article 1 of the United States Constitution for the following among other reasons, to-wit:

(1) The Iowa [illegible] of the use [illegible] commerce trans-

actions, burdens interstate commerce by being applicable to such transactions while not applicable to local intra-state commerce of a similar nature within the State of Iowa.

(2) The Iowa Use Tax Law places upon this plaintiff the burden with reference to interstate commerce transactions of ascertaining the place where merchandise purchased is to be used by the purchaser, which burden is not placed upon other merchants doing solely a local and intra-state business within the territorial limits of the State of Iowa.

(3) By virtue of the provisions making this plaintiff primarily liable for the amount of the use tax it is required to collect, such liability is made to attach upon the exercise by this plaintiff of the privilege of engaging in the interstate commerce transactions described above.

(4) Plaintiff is by virtue of the provisions of Section 8 of the Iowa Use Tax Law subjected to the burden of giving to purchasers in interstate commerce a receipt for the amount of the use tax collected, which is a requirement not placed upon those in competition with this plaintiff doing [fol. 10] solely an intra-state retail business within the boundaries of the State of Iowa.

(5) The exercise by the plaintiff of the privilege of selling merchandise in interstate commerce is burdened and restricted by the requirement that the plaintiff act as collector of the use tax for the State of Iowa in connection with its interstate commerce transactions.

(6) The provision that the plaintiff be primarily liable for the tax required to be collected at the time of making a sale of merchandise for use in Iowa makes the burden upon the plaintiff in substance identical with the burden of a sales tax imposed at the time of making such sales.

(7) The incidence of the burden of primary liability for the use tax is equally capable of imposition by the state in which the sale is consummated.

(8) The provision that sales or use taxes paid [illegible] states shall be credit[illegible]

[illegible] the burden of [illegible] such double returns as to plaintiff's interstate transactions while local intra-state commerce transactions would not be so burdened.

(b) The requirement that the plaintiff collect the Iowa Use Tax on merchandise sold by the plaintiff at retail at points outside the State of Iowa while no use tax is imposed upon the use of merchandise sold in intra-state commerce within the State of Iowa violates Section 10 of Article 1 of [fol. 11] the Constitution of the United States in that the use tax in such instance amounts to an impost or duty on merchandise imported into the State of Iowa for use and consumption therein.

(c) The Iowa Use Tax Law as applied to this plaintiff violates the Fourteenth Amendment to the Constitution of the United States in the following particulars among others, to-wit:

(1) The State of Iowa has no jurisdiction over the plaintiff's sales activities carried on at its St. Paul, Minnesota, Kansas City, Missouri, or Chicago, Illinois, mail order houses, or at its Illinois, Missouri, Nebraska, South Dakota, and Minnesota retail stores.

(2) The requirement that this plaintiff act as a tax collecting agent of the State of Iowa at a point outside of the State of Iowa is an attempt of the State of Iowa to enforce its laws extraterritorially.

(3) The requirement that this plaintiff because it operates retail stores within the State of Iowa must collect this tax upon sales of merchandise for use in the State of Iowa made outside of the State of Iowa through its aforesaid mail order houses and retail stores discriminates between this plaintiff and other competing mail order companies and retail stores making similar sales which do not maintain a place of business in the State of Iowa and are not subject to the Iowa Use Tax Law.

(4) The requirement that this plaintiff be primarily liable for a tax imposed upon others with respect to a privilege not exercised by this plaintiff deprives plaintiff [fol. 12] of its property without due process of law, and deprives it of the equal protection of the laws.

(5) The requirement that this plaintiff collect the tax when

"making sales of tangible personal property for use in this state"

is arbitrary, capricious, and vague in that it does not set forth any standard for determining when sales made outside of the State of Iowa are made for use within the State of Iowa, and subjects this plaintiff to determine at its peril questions of fact in each case whether or not such sales were made for use in the State of Iowa and whether or not plaintiff or its employees had knowledge of the fact that the property sold would be used within the State of Iowa.

(6) The meaning and application of the Iowa Use Tax Law cannot be determined without reference to the provisions of other and separate statutes of the State of Iowa, especially the Iowa Sales Tax Law, nor without reference to the statutes of states other than Iowa.

(7) The exemption in Section 3 of the Iowa Use Tax Law of the use of merchandise used in interstate commerce and of merchandise used in the performance of contracts entered into prior to the enactment of the Iowa Use Tax Law, and of merchandise not readily obtainable in the state of Iowa used in the operations of street railways makes the operation of the Iowa Use Tax Law as to this plaintiff arbitrary, capricious, and vague in that it imposes upon the plaintiff at its peril the duty of ascertaining facts not within its ordinary knowledge nor capable [fol. 13] of exact definition or ascertainment, and is discriminatory against the plaintiff.

(8) The requirement that this plaintiff act as a tax collecting agent of the State of Iowa at points outside of the State of Iowa without receiving any compensation therefor deprives this plaintiff of its property without due process of law.

(d) The Iowa Use Tax Law is unconstitutional and void because it imposes a tax upon the use of objects which can only be determined by reference to another law in violation of Article VII, Section 7 of the Iowa Constitution, and is further unconstitutional and void because in respects heretofore set forth it is arbitrary, unreasonable, discriminatory, capricious, vague, and confiscatory in violation of Article I, Section 9, and Article I, Section 6, of the Iowa Constitution, and is further unconstitutional and void because it is a special law for the assess-

ment and collection of taxes for state purposes, in violation of Article III, Section 30, of the Iowa Constitution.

(e) The Iowa Use Tax Law is unconstitutional and void in violation of Article III, Section 29, Iowa Constitution, in that the title to the said Act states that it imposes a

"tax on the use in this State of tangible personal property, as such terms are defined herein, * * *"

which is an excise tax, but that the provisions of said Act actually impose and levy a direct tax upon certain businesses, including the business of this plaintiff, and said Act further provides for the levy and collection of [fol. 14] said tax as a direct obligation of certain businesses, including the business of this plaintiff; that said Act therefore embraces more than one subject, which is not expressed in the title to the Act.

22. Plaintiff alleges that Sections 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, and 27, are inseparable and incapable of application if separately construed or separately made effective.

23. Plaintiff has during the past several years built up a substantial business in the State of Iowa which the defendants threaten to destroy by revocation of the plaintiff's license to conduct a retail business and by procuring the termination of the plaintiff's authority to conduct business in the State of Iowa. Plaintiff states that irreparable injury will result to plaintiff unless the defendants are enjoined from proceeding with the said threatened revocation of plaintiff's permit to do a retail business in the State of Iowa and its license to do business in the State of Iowa. Plaintiff states that it has as a result of the operation of its retail stores acquired good will which is dependent upon its ability to continue to serve its customers to service the merchandise already sold to them, and to continue to fill their requirements, which would be irreparably damaged by any cessation of its retail business. Plaintiff states that it has no plain, speedy and adequate remedy at law since there is no provision of an appeal from the threatened order of revocation during the time of which appeal plaintiff could continue to operate its business, there being no provision for payment of the tax and suit to recover it back in an

action against the State of Iowa. Plaintiff states that the Iowa Use Tax Law became effective April 16, 1937, and that the first action taken by the state to compel the plaintiff to collect the use tax in connection with sales [fol. 15] made through its mail order houses and retail stores in adjoining states to Iowa customers of merchandise to be used in the State of Iowa was the notice, referred to in Paragraph Four above, served upon it February 28, 1938, and that an order enjoining defendants and each of them from proceeding to revoke the plaintiff's license to conduct a retail business and from certifying to the Secretary of State for purposes of withdrawing the authority of the plaintiff to do business in the State of Iowa, that the plaintiff has failed to comply with the provisions of the Iowa Use Tax Law is necessary pending a full hearing on the merits of this suit in order to preserve the status quo of the plaintiff and of the defendant Board.

Wherefore plaintiff prays that the defendants individually and as members of the Iowa State Board of Assessment and Review be permanently enjoined and restrained from doing any or each of the following:

(a) Making any finding of fact that this plaintiff has failed to comply with the requirements of the order of the Board dated February 26, 1938.

(b) Making any finding that this plaintiff has failed to comply with the provisions of the Iowa Use Tax Law.

(c) Revoking or cancelling any sales permit issued to the plaintiff covering the operation of its retail establishments in the State of Iowa.

(d) Sending any copy of any order of the said Board with respect to this plaintiff's failure to comply with the Iowa Use Tax Law to the Secretary of State of the State of Iowa.

(e) Making any request upon the Secretary of State of the State of Iowa for the revocation of the permit of [fol. 16] this plaintiff to do business within the State of Iowa.

(f) From taking any action or issuing any order under or in accordance with the resolution and order of the re-

spondent, Exhibit "A" attached hereto, dated February 26, 1938.

(g) From taking any action that will in any way disturb the position of this plaintiff with respect to its business in the State of Iowa as a result of any failure on the part of this plaintiff to comply with any provisions of the Iowa Use Tax Law.

Plaintiff further prays this court to issue a temporary order restraining and enjoining the said defendants from taking any action as outlined above or proceeding further in this matter until such time as this suit may be heard upon its merits.

Plaintiff further prays for such other and further relief as in equity may be proper and necessary.

P. G. C. & O. B., Robert L. Wright, Stuart S. Ball,
Attorneys for Plaintiff.

EXHIBIT "A" TO PETITION

Notice

To Montgomery Ward & Company:

You are hereby notified that on the 26th day of February, 1938, the Iowa State Board of Assessment and Review pursuant to the powers vested in it by law of the State of Iowa did make and enter the Resolution and Order hereto attached marked Exhibit "A" and hereby made a part of this Notice.

[fol. 17] You are further notified that in accordance with the Resolution and Order hereto attached the hearing ordered in said Resolution and Order will be held on the 15th day of March, 1938, at 9:30 A. M. at the offices of the Iowa State Board of Assessment and Review at the Des Moines Building, Des Moines, Iowa, to determine whether or not you have complied with the said Order.

You are further notified that if at said hearing the Iowa State Board of Assessment and Review shall find that you have willfully failed to comply with the requirements of the Resolution and Order thereto attached and marked Exhibit "A", then the sales permit heretofore issued to you for the operation of your retail establishments in the State

of Iowa will be cancelled and an order shall be entered finding that you have failed to comply with the provisions of the Use Tax Act and the orders of the Iowa State Board of Assessment and Review in connection therewith and a copy of said order shall be transmitted to the Secretary of State with the request that your permit to do business within the State of Iowa shall be revoked.

You are further notified that at the hearing to be held at the time and place above specified you may appear and show cause, if any you have, why the orders contained in the Resolution and Order attached hereto or the orders above referred to, or any of them, should not be made and enforced.

You will govern yourselves accordingly.

Iowa State Board of Assessment and Review, Louis E. Boddewig, Chairman.

STATE OF IOWA,
Polk County, ss:

I, Charles Bookin being first duly sworn on oath state that on the 28th day of February, 1938, I served the within [fol. 18] notice to which was attached a true and correct copy of the Resolution and Order of the Iowa State Board of Assessment and Review dated this 26th day of February, 1938, and marked Exhibit "A" upon Montgomery Ward & Company by delivering a true and correct copy of said Notice and Resolution and Order attached thereto and offering to read the original, which reading was waived, to A. M. Nordtvedt, who is the manager of the Des Moines retail branch maintained by Montgomery Ward & Company, and who is an agent in this State engaged in the transaction of Montgomery Ward & Company's business.

Charles Bookin.

Subscribed and sworn to before me, a Notary Public in and for Polk County, Iowa, this 28th day of February, 1938. E. Mae Sweany, Notary Public in and for Polk County, Iowa.

Exhibit "B" to Petition

Resolution and Order of the Iowa State Board of Assessment and Review.

At a meeting of the State Board of Assessment and Review held this 26th day of February, 1938, the matter of Montgomery Ward & Company came before the Board for consideration in regard to the Use Tax law. On motion of C. F. Green, seconded by D. L. Murrow the following resolution and order was adopted, all members of the Board voting aye:

Whereas, Montgomery Ward & Company is a corporation organized under the laws of the State of Illinois for the purpose of engaging in the retail sale of wares and miscellaneous articles of merchandise; and

[fol. 19] Whereas, Montgomery Ward & Company did on or about the 30th day of July, 1934, duly make application under the provisions of Chapter 386 of the 1931 Code of Iowa to the Secretary of State for a permit to transact business in the State of Iowa and pursuant thereto received a permit authorizing it to conduct and carry on its business in the State of Iowa; and

Whereas, Montgomery Ward & Company has heretofore made application for and received a permit to transact business as a retailer within the State of Iowa and by virtue of the foregoing maintains within the State of Iowa approximately 27 retail establishments or places of business and is a retailer within the purview of subdivisions 5 and 6 of Section 1 of Chapter 198 of the Laws of the 47th General Assembly; and

Whereas, Montgomery Ward & Company issues, distributes and widely circulates in Iowa its catalog wherein it describes and pictures merchandise which is obtainable at its various retail establishments within the State of Iowa or at retail establishments maintained by other retailers in the State of Iowa and solicits the purchase of any of the items so described in its catalog through mail orders sent direct to its home office in Chicago, Illinois there to be accepted, filled and shipped; and

Whereas, one or more of said catalogs are also kept at each of the said retail stores maintained by Montgomery Ward & Company within the State of Iowa; and whereas citizens and residents of the State of Iowa who come to

any of said stores of Montgomery Ward & Company located in the State of Iowa are assisted in selecting from the mail order catalogs there kept and displayed any of the articles of merchandise listed therein and are assisted in filling out order blanks for said merchandise to be mailed to the Chi-
[fol. 20] cago, Illinois branch of said company by either the purchaser or the assisting retail store; and

Whereas, attached to its catalog, Montgomery Ward & Company has the following notation:

"To Our Iowa Customers:

We believe that certain of the provisions of the Iowa Use Tax as applied to our business are unconstitutional. We are therefore not collecting or reporting the use tax on mail orders sent by Iowa customers direct to any of our mail order houses. Until you hear from us to the contrary, mail in your orders just as you have in the past.

Montgomery Ward & Company"; and

Whereas, it is intended, and as a matter of fact, citizens and residents of Iowa are thereby induced and encouraged to view at the retail establishments maintained by Montgomery Ward & Company items of merchandise that they desire to purchase and then to mail or have their orders mailed for said merchandise to Montgomery Ward & Company's Chicago, Illinois office to be shipped direct to said purchaser by mail, freight, or express and thus avoid the 2% sales tax or use tax which said purchaser otherwise would have had to pay if he had purchased said item in Iowa, or from some other retailer maintaining a store in Iowa, or had taken said item from the stock of merchandise kept at one of the retail establishments maintained by Montgomery Ward & Company in the State of Iowa; and

Whereas, Montgomery Ward & Company has failed, neglected, and refused to comply with the provisions of Chapter 198 of the Acts of the 47th General Assembly in the following particulars, to-wit:

[fol. 21] (a) By refusing and failing to comply with the mandatory provision of Section 8 of the Act, which requires every retailer maintaining a place of business in the State of Iowa and making sales of tangible personal property for use in the State of Iowa to collect the tax imposed by the Act from the purchaser at the time of making the sale,

whether said sale was made within or without the State of Iowa;

(b) By neglecting, failing, and refusing to file with the Board returns showing the sales of any or all tangible personal property sold by Montgomery Ward & Company during the preceding quarterly period for use within the State of Iowa, or to make any remittance of the amount of such tax which they are by Section 12 of the Act required to collect;

(c) By advertising, holding out, and stating to the public and to its customers that the tax imposed by the Act will not be added to the selling price of the merchandise purchased from it by its customers, and that it will not collect nor report the same, all in contravention of the provisions of Section 10 of the Act; and

Whereas, it is a matter of common knowledge that it is impossible from an enforcement and administrative standpoint for the State of Iowa to collect the use tax or the sales tax from the purchaser unless the retailer, acting as the designated agent of the state collects said tax and remits the same to the State; and

Whereas, Montgomery Ward & Company is given equal protection to its property located within the State of Iowa and is equally offered all of the facilities enjoyed by any other retailer in the State of Iowa; and

[fol. 22] Whereas, Montgomery Ward & Company by its refusal to comply with the provisions of the Act as above specified seeks to and does unfairly compete with all other retail dealers in the State of Iowa who comply with the requirements of the sales tax act and the use tax act and who collect said sales and use tax as by law required; and

Whereas, Montgomery Ward & Company is engaging in an unfair trade practice by using the branch retail establishments it maintains in the State of Iowa and the retail establishments it maintains outside of the State of Iowa as a means of circumventing the sales tax act of Iowa and as a means of offering its customers a 2% differential on all purchases made by said Iowa customers from it over like purchases said customers might make from other Iowa retailers; and

Whereas, Montgomery Ward & Company by adopting the aforesaid practices and publicly refusing to perform its

duties with reference to the use tax is inducing citizens of this State to evade the laws of the State of Iowa to the detriment of the public revenue and to the unfair advantage of law abiding competitors.

Now, Therefore, Be It Resolved by the Iowa State Board of Assessment and Review pursuant to the powers vested in it by law, and it is hereby Ordered as follows:

1. That Montgomery Ward & Company comply with the mandatory provisions of Section 6 of Chapter 198 of the Acts of the 47th General Assembly, known as the Use Tax Act, by collecting from its Iowa purchasers the tax required on all sales of tangible personal property sold by it to said purchaser for use in the State of Iowa.

2. That Montgomery Ward & Company file with the Iowa Board of Assessment and Review within twelve [fol. 23] days from the date of the service of this order all quarterly reports required by the provisions of the Use Tax Act, Chapter 198 of the Laws of the 47th General Assembly and not heretofore filed.

3. That Montgomery Ward & Company pay to the Iowa Board of Assessment and Review within twelve days from the date of the service of this order all use tax due the State of Iowa as shown by said quarterly reports and as required by the provisions of Chapter 198 of the Laws of the 47th General Assembly and all penalties and interest due thereon as required by Section 17 of said Act.

4. That Montgomery Ward & Company publicly announce, within twelve days from the date of the service of this order, to its Iowa customers that all purchases made by them, from it, of merchandise for use in the State of Iowa and on which an Iowa sales tax has not been paid will be subject to a 2% use tax which will be added to the sales price and collected from said customer by Montgomery Ward & Company.

5. That Montgomery Ward & Company make available at Des Moines, Iowa within twelve days from the date of the service of this order all of its books, papers, and records relating to all sales of tangible personal property made by it beginning with the first day of April, 1937 to Iowa customers for use or enjoyment within the State of Iowa for

such examination and audit as the Iowa State Board of Assessment and Review shall deem it advisable to make.

It is further resolved and ordered that on the 15th day of March, 1938 at 9:30 A. M. a hearing will be held by the Iowa State Board of Assessment and Review at its office in Des Moines, Iowa to determine whether or not the above and foregoing order and all portions thereof have been complied with at which time and place you, Montgomery [fol. 24] Ward & Company may be present and represented by counsel, if you so desire.

It is further resolved and ordered that if at said hearing the Iowa State Board of Assessment and Review shall find that you have wilfully failed to comply with the requirements of the foregoing order, then the sales permit heretofore issued to you for the operation of your retail establishments in the State of Iowa will be cancelled and an order shall be entered finding that you have failed to comply with the specific provisions of the Use Tax Act and the orders of the Iowa State Board of Assessment and Review in connection therewith, and a copy of said order shall be transmitted to the Secretary of State with the request that your permit to do business within the State of Iowa shall be revoked.

It is further resolved and ordered that at the hearing to be held at the time and place above indicated, you may appear and show cause, if any you have, why the orders above referred to or any of them should not be made.

Signed this 26th day of February, 1938.

Iowa State Board of Assessment and Review, by Louis E. Roddewig, Chairman, D. L. Murrow, Vice Chairman, C. F. Green, Member.

ORDER GRANTING TEMPORARY INJUNCTION

Thereafter on the 15th day of March, 1938, an order granting temporary injunction was entered by the District Court directing that a writ of injunction issue restraining the defendants from:

(a) Making any finding of fact that the plaintiff has failed to comply with the requirements of the Board dated February 26, 1938;

(b) Making any finding that the plaintiff has failed to [fol. 25] comply with the provisions of the Iowa Use Tax Law;

(c) Revoking or cancelling any sales permit issued to the plaintiff covering the operation of its retail establishments in the State of Iowa;

(d) Sending any copy of any order of the said Board with respect to the plaintiff's failure to comply with the Iowa Use Tax Law to the Secretary of State of the State of Iowa;

(e) Making any request upon the Secretary of State of the State of Iowa for the revocation of the permit of the plaintiff to do business within the State of Iowa;

(f) From taking any action or issuing any order under or in accordance with the resolution and order of the respondent dated February 26, 1938, in connection with the claimed failure of the plaintiff to comply with the Iowa Use Tax Law;

(g) From taking any action that will in any way disturb the position of the plaintiff with respect to its business in the State of Iowa, as a result of any claimed failure on the part of the plaintiff to comply with any provisions of the Iowa Use Tax Law;

Injunction bond fixed in the sum of $20,000.00.

Thereafter on the same day writ of injunction was served on the defendants enjoining them from the acts set forth in the order for the writ as listed above.

Thereafter on April 21, 1938, defendants filed the following motion:

Motion to Strike from Petition

Come now the defendants in the above entitled action in their individual capacity and as members of the Iowa State [fol. 26] Board of Assessment and Review and move the Court:

1. To strike from the plaintiff's petition the following language appearing in Paragraph numbered 10 thereof:

"The plaintiff offers for sale at its said mail order houses at Chicago, Kansas City, and St. Paul, and through its said catalogs, many items of merchandise which are not offered

for sale through its retail stores located in the State of Iowa."

for the following reasons:

A. That the said averment is incompetent, irrelevant and immaterial to plaintiff's purported cause of action and constitutes redundant matter and surplusage.

2. To strike from the petition of the plaintiff the following language appearing in Paragraph 11 thereof:

"Plaintiff further states that the Board has never attempted to assess or collect an Iowa sales tax on such sales made in interstate commerce."

for the following reasons:

A. That said averment is the averment not of an ultimate fact, but of a mere conclusion and wholly incompetent, irrelevant and immaterial and constitutes redundant matter and surplusage.

3. To strike from the petition of the plaintiff the fifteenth paragraph there reading as follows:

"Plaintiff states that there are other mail order houses operated by corporations which are not licensed to do busi- [fol. 27] ness in the State of Iowa which do not maintain a place of business in the State of Iowa, which have not been authorized to collect and do not collect the Iowa Use Tax as above provided, and which are in substantial competition with the plaintiff's mail order houses in making sales to residents of Iowa. Plaintiff further states that there are other retail stores not located in the State of Iowa operated by corporations or individuals who do not maintain a place of business in the State of Iowa and who are in competition with plaintiff's retail stores in Minnesota, Illinois, Missouri, and Nebraska in making sales to residents of Iowa."

for the following reasons:

A. That the said averment is the averment not of an ultimate fact but states a mere conclusion which is wholly incompetent, irrelevant and immaterial to the plaintiff's purported cause of action and constitutes redundant matter and surplusage.

B. For the reason that the said averment is not the averment of an ultimate fact but the statement of a mere guess which does not purport to be founded upon any alleged fact or facts and is wholly incompetent, irrelevant and immaterial.

4. To strike from the petition of the plaintiff the following language appearing in Paragraph 16 thereof:

"Plaintiff states that the maintenance of such records in such mail order houses and retail stores would be a substantial expense and plaintiff states that such records are not kept by others who operate mail order houses and retail stores in competition with this plaintiff in making such sales to Iowa customers but who do not maintain a place of business in the State of Iowa."

[fol. 28] for the following reasons:

A. For all of the reasons urged in "A" and "B" of the third subdivision hereof.

B. Because the only matter properly triable in this proceeding is as to whether or not the provisions of the Iowa Use Tax Act are properly applicable to this plaintiff, and whether or not said provisions are being enforced or are applicable to others who are not parties to this action is immaterial and irrelevant.

5. To strike from the paragraph numbered 17 of said petition of the plaintiff the following language:

"Plaintiff shows to the court that by the operation of this section all sales in local intra-state commerce consummated in the State of Iowa are exempted from the operation of the Iowa Use Tax Law."

for the following reasons:

A. That the said averment is wholly irrelevant and immaterial to any purported cause of action of the plaintiff and constitutes redundant matter and surplusage.

B. That the only matter properly triable in this proceeding is whether or not the provisions of the Use Tax Act are applicable to the plaintiff and whether or not it must comply therewith and that whether or not others who are not

parties to this atcion are exempted from the operation of the Iowa Use Tax Act is immaterial and irrelevant.

6. To strike from the petition of the plaintiff the following language appearing in Paragraph 18 thereof:

"Plaintiff further shows to the court that in other states adjoining the State of Iowa taxes are imposed upon the occupation of retailing measured by the amount of gross [fol. 29] sales, and that the incidence of such taxes is upon the transactions of sale even though the sale or use of the property is not subjected to tax."

for the following reasons:

For all of the reasons urged in Subdivisions "A" and "B" of Paragraph Five hereof.

7. To strike from the petition of the plaintiff the following language appearing in Paragraph 19 thereof:

"Plaintiff states that retail merchants doing a purely local business in the State of Iowa cannot be compelled by any provisions of existing law to prepare or issue any such receipts in connection with local intra-state sales as the plaintiff by Section 8 of the Iowa Use Tax Law is subject to be required to issue with respect to its sales in interstate commerce described above. Plaintiff further alleges that the issue of such receipts in each individual case would materially and substantially add to the expense of conducting its interstate commerce described above."

for the following reasons:

For all of the reasons urged in Subdivisions "A" and "B" of the fifth paragraph hereof.

8. To strike from the petition of the plaintiff the following language appearing in Paragraph 23 thereof:

"Plaintiff states that the Iowa Use Tax Law became effective April 16, 1937, and that the first action taken by the State to compel the plaintiff to collect the tax in connection with the sales made through its mail order houses and retail stores in adjoining states to Iowa customers of mer- [fol. 30] chandise to be used in the State of Iowa was the notice referred to in Paragraph 4 above served upon it February 28, 1938."

for the following reasons:

A. That said averment is the averment not of an ultimate fact but states a conclusion which is wholly incompetent, irrelevant and immaterial to the plaintiff's purported cause of action and constitutes redundant matter and surplusage.

B. That the only matter properly triable in this proceeding is whether or not the provisions of the Iowa Use Tax Act are applicable to the plaintiff and whether or not it must comply therewith, and the question of whether or not prior attempts were made to secure the plaintiff's compliance with the provisions of the Use Tax Act are immaterial and irrelevant and constitute redundant matter and surplusage.

RULING ON MOTION TO STRIKE

The above Motion was overruled and thereafter on June 19, 1938, the defendants filed the following Answer:

ANSWER

Come now the defendants in the above entitled case and for answer to the plaintiff's petition deny each and every allegation therein contained not hereinafter specifically admitted, modified, or qualified.

1. The defendants admit the allegations contained in Paragraphs 1, 2, 4, 6, 9, 11, 13, 14 and 20 of the plaintiff's petition.

2. The defendants have neither knowledge nor information sufficient to form a belief as to the allegations contained in Paragraph 3 of plaintiff's petition wherein the plaintiff sets out the assessed valuation of its property within the [fol. 31] State of Iowa and gives the gross amount of its sales in 1937 and, therefore, deny the same and ask that the court require strict proof from plaintiff.

3. The defendants have neither knowledge nor information sufficient to form a belief as to the truth or correctness of the allegations contained in Paragraph 15 of the plaintiff's petition and, therefore, deny the same and ask that the court require strict proof from the plaintiff concerning the same.

4. Further answering, the defendants state that the plaintiff has an adequate, plain and speedy administrative rem-

edy and also a plain, speedy, efficient and adequate remedy at law in the courts of the State of Iowa. That the plaintiff has refused to avail itself of the procedure and machinery provided by the statutes of the State of Iowa and by the law courts of the State of Iowa or to appear before the Iowa State Board of Assessment and Review and show cause why it should not comply with the provisions of the Iowa Use Tax Act, but instead, seeks to invoke the equitable jurisdiction of this court. That an action in equity does not lie because of the plaintiff's failure to avail itself of its administrative remedy and because there is a plain, speedy, efficient and adequate remedy at law.

Further answering, the defendants aver and state that the Iowa Sales Tax Act, Chapter 196 of the Laws of the 47th General Assembly, which by reference thereto is hereby made a part of this Answer, and the Iowa Use Tax Act must be construed together in determining whether the Iowa Use Tax Act imposes a burden upon interstate commerce. That when so construed together the defendants state and aver that it is apparent that the said Iowa Use Tax is not so measured or conditioned as to hamper [fol. 32] the transactions of interstate commerce or discriminate against it but rather that equity is the theme that runs through all the sections of the said Iowa Use Tax Act.

Further answering, the defendants state that the purpose of the plaintiff in refusing to comply with the provisions of the Iowa Use Tax Act is to employ its branch retail establishments within the State of Iowa and its retail establishments without the State of Iowa as a means of attempting to circumvent the Iowa Sales Tax Act and the Iowa Use Tax Act and as a means of offering its Iowa customers a two per cent differential on all purchases made by said Iowa customers from it over like purchases said customers might make from other Iowa retailers who do comply with the Iowa Retail Sales Act and the Iowa Use Tax Act.

John H. Mitchell, Attorney General of the State of Iowa, Charles Bookin, Special Assistant Attorney General, Charles W. Wilson, Assistant Attorney General, Attorneys for the defendants in their individual capacity and as the Iowa State Board of Assessment and Review.

Thereafter on October 14, 1938, plaintiff filed the following reply:

Reply

Comes now the plaintiff and, for reply to the answer of the defendants, alleges as follows:

1. That the plaintiff denies each and every affirmative allegation contained in the answer of the defendants.

[fol. 33] 2. That as to Paragraph Four of the defendants' answer, this plaintiff alleges that it does not have an adequate, plain and speedy administrative remedy for the following reasons, among others:

(a) The Use Tax Act does not provide for a hearing and appeal.

(b) That this plaintiff did not comply with the demands made upon this plaintiff under the terms and conditions of the notice and order served upon it, which notice and order are attached to plaintiff's petition and marked Exhibits "A" and "B", and that by virtue of same and under the terms of the notice and order the Iowa State Board of Assessment and Review would have automatically rescinded the sales license issued to it and would have taken the steps contemplated to have its right to do business in the State terminated—all as set out in said notice and order.

3. Further replying to the fourth paragraph of the answer of the defendants, this plaintiff alleges that it has no speedy, plain and adequate remedy at law, and that no remedy at law is provided by the statutes of the State of Iowa.

4. Further replying to the fourth paragraph of the answer of the defendants, the plaintiff alleges that to construe the Iowa Sales Tax Act, Chapter 196 of the Laws of the Forty-seventh General Assembly and the Iowa Use Tax Act together, in determining whether the Iowa Use Tax Act imposes a burden on Interstate Commerce, is contrary to Section 7, Article VII, Constitution of the State of Iowa, and such construction would be unconstitutional for said reason, and for all the reasons urged in plaintiff's petition.

[fol. 34] Wherefore, plaintiff prays as in its original petition.

Maxwell O'Brien, J. L. Parrish, Jr., H. W. Bancroft, Stuart S. Ball, Attorneys for Plaintiff.

The trial of this case was had before the Honorable John J. Halloran, Judge of the District Court of Polk County, Iowa, and commenced on Thursday, October 13, 1938.

EVIDENCE OF PLAINTIFF, MONTGOMERY WARD & CO.

G. W. VAUGHT, called as a witness on behalf of the plaintiff, having been sworn by the Court, testified as follows:

I live in Kenilworth, Illinois, and I am the Treasurer and Director of Montgomery Ward & Company. I have been employed by the Montgomery Ward & Company for 21 years having served in the major divisions of the business, such as merchandising, sales, operating and finance. I was assistant manager of the packing and shipping department in the Chicago Mail Order House. I had charge of the clerical office which had to do with the handling of orders. I was merchandise controller and for a time the sales executive of the business. In this latter connection I issued the bargain book and assisted in the preparation of catalogs. In the financial division I was bookkeeper, head of the accounts payable department, branch house auditor, assistant treasurer, credit manager and treasurer. I have been treasurer for five years and I was head of the time payment or credit department from 1931 until 1933. [fol. 35] The records in the credit department show the address and residence of the various customers. I have supervision and general control over the books and records of the corporation. Montgomery Ward & Company is incorporated under the laws of Illinois and it is licensed to do business in Iowa. Its business consists of distributing general merchandise both through retail stores and mail order catalogs. With regard to the method the company uses to distribute merchandise through retail stores, I will state we have a store in a town with merchandise in it just like any other department or retail store and it is sold by clerks over the counter. A large classification of the goods so sold would be soft lines, consisting principally of clothing, house furnishings, consisting of furniture, jewelry and practically all things used in the household, and hard lines, consisting of hardware items, including farm implements, stoves, refrigerators and sporting goods.

The company has mail order houses located in Chicago, Illinois, Kansas City, Missouri, Fort Worth, Texas, Denver, Colorado, Portland, Oregon, Oakland, California, St. Paul, Minnesota, Albany, New York and Baltimore, Maryland. The Company started its mail order business in 1872. The Company has never maintained a mail order house within the State of Iowa, but it has made sales from the mail order houses outside the State of Iowa, and at present sales to customers within the State of Iowa are made from the Chicago, St. Paul and Kansas City houses. The Chicago mail order house first opened in 1872; the St. Paul mail order house in 1921 and the Kansas City mail order house was opened and in operation before I became associated with Montgomery Ward & Company. They are all three continuously engaged in business and have been since I have been associated with the Company.

[fol. 36] Montgomery Ward & Company had, as of August 1st, 1938, 29 stores operating within the State of Iowa. The amount of the investment which the Company has in these stores operating in the State of Iowa is $914,574.00 according to the assessed valuation as of the year 1937. The business conducted by these stores is exclusively a retail business with the exception of a small fence fabricating factory located at Fort Madison, Iowa. The Company first began to operate its retail stores with the Waterloo store opened January 14, 1928. The approximate sales made by the Company's retail stores in the year 1937 in the State of Iowa totaled $7,715,968.41. The stocks of merchandise carried in the retail stores located in Iowa average five thousand items and about 25% of the merchandise carried in the retail stores in Iowa is duplicated identically in the mail order houses and about 2 per cent of the merchandise carried for sale in the mail order houses is duplicated identically in the retail stores. We keep an analysis of all the items carried in the store, the number off stock keeping units, the space required and the dollar value of them. When I was merchandise controller I specified the merchandise that went into the stores and prepared the list of merchandise that could be carried in the stores, known as the basic lists. I still have occasion to study those basic lists and, as the present treasurer, I personally approve all orders over a certain dollar value.

The stocks of merchandise carried in the Chicago mail order house and in the St. Paul mail order house and in

the Kansas City mail order house are similar with the exception that the Chicago house carries slightly more items.

As the treasurer of Montgomery Ward & Company, I am familiar with the general catalog and familiar with the requirements as to space and light of a physical building [fol. 37] necessary to afford facilities to carry on a general mail order business. There is not sufficient space in any of the stores in Iowa for mail order business. There have not been any taxes or license fees to the State of Iowa for the privilege of carrying on the mail order business in any of the three mail order houses at any time during my association with the company. Prior to the opening of the Waterloo store on January 14, 1928, there was no factory or any other operation of the company conducted within the State of Iowa. The first operation was by the Delaware Corporation, a subsidiary corporation which operated from 1928 until the Illinois corporation was licensed August 1, 1934.

Mr. Ball: It is stipulated between counsel that this is a certified copy of the application for license to do business in the State filed by Montgomery Ward & Company, an Illinois corporation.

(The document referred to here presented and marked plaintiff's Exhibit "A".)

Offer: Mr. Ball: And our stipulation covers the fact it is offered and to be received in evidence.

Because the retail stores do carry only a portion of the wide selection handled by the mail order houses, many orders are referred by the retail stores to the mail order houses. We maintain a mail order service desk in each retail store with a clerk in attendance for that purpose. The profit from such sales is credited to the mail order business with a commission paid to the retail store for handling the business.

Q. What is the fact, if you know, as to whether or not the Iowa Sales Tax or Use Tax, either one, is being collected on such orders taken by the retail stores in Iowa and forwarded to the mail order houses for filing?

A. Yes, the tax is being collected and paid.

[fol. 38] Q. What is the fact as to whether or not presently the returns are being made to the State of Iowa covering the amount of these taxes?

A. They are being made.

The method by which the company sells merchandise to its Iowa customers by mail order is as follows:

The catalogs are distributed to the prospective customers in the State of Iowa. They select the merchandise, prepare an order for it, usually on an order blank that is provided in the catalog, specify the article, number, description and price and send the order with remittance to the mail order house. The remittance being for the cost of the merchandise and the transportation.

Approximately six million general catalogs are distributed twice a year and in addition to the general catalogs two small catalogs a year are distributed in greater number, the Christmas catalog; the bargain books, and a great many small special catalogs such as the tombstone catalog. With very few exceptions the catalogs sent to customers of the Kansas City mail order house are identical with the catalogs distributed to the customers whose orders are sent to Chicago and St. Paul. Certain items for use in cold climates are in the St. Paul catalog, but not in the Kansas City catalog. There are different instructions with regard to shipping in the catalogs.

(Six Montgomery Ward catalogs here marked respectively plaintiff's Exhibits "B", "C", "D", "E", "F", and "G".)

Mr. Bookin: No necessity of identifying them. I do want to object to their materiality.

Offer: Mr. Ball: If we can stipulate what they are by giving an explanation here. In connection with the testimony of this witness we offer into evidence what the reporter has marked Exhibit "B".

[fol. 39] The Court: I suggest you have the volumes identified as exhibits, and then some general description of them before you offer them into the record. In other words, have in the record something to indicate what Exhibit "B" is before you offer it, please.

Mr. Ball: It is stipulated that this witness would identify Exhibit "B" as the spring and summer catalog for the

year 1938, Chicago book being the form of the general catalog distributed at that time calling for customers' orders to be mailed to the mail order house at Chicago. Exhibit "C" is a spring and summer catalog for 1938, St. Paul book. That Exhibit "D" is a spring and summer catalog, 1938, Kansas City book. That Exhibit "E" is the fall and winter, 1937-1938 book, for St. Paul. Exhibit "F" is the fall and winter, 1937-1938 catalog, Chicago. That Exhibit "G" is the fall and winter 1937-1938 book for Kansas City. And that all of the catalogs distributed to Iowa customers—general catalogs—for these two general catalog periods, were similar to the six exhibits.

The Court: Now, are you offering them?

Offer: Mr. Ball: We now offer into evidence Exhibits "B", "C", "D", "E", "F" and "G".

Mr. Bookin: The offer of Exhibits "B" through "G", both inclusive, are objected to as incompetent, irrelevant and immaterial to any issue in this case.

The Court: But you waive any other formal identification?

Mr. Bookin: That's right, your Honor, formal identification is waived.

(A paper here presented and marked plaintiff's Exhibit "H": Order Blank.)

Mr. Ball: It is stipulated that the witness would identify plaintiff's Exhibit No. "H" as the order blank forms which have been used in all general catalogs and other catalogs [fol. 40] during the period from the enactment of the Iowa Use Tax Act up to the date of the filing of this petition.

The Court: Is that agreed to?

Mr. Bookin: Preliminary proof and identification being waived, the defendants object to Exhibit "—".

The Court: I ask you——

Mr. Bookin: Yes, waive preliminary proof and identification, your Honor.

Offer: Mr. Ball: Plaintiff offers into evidence Exhibit "H".

Mr. Bookin: Exhibit "H" is objected to as incompetent, irrelevant and immaterial to any issues in this case.

The spring and summer, 1938 catalog was distributed to Iowa customers during January and February and the gen-

eral catalog was distributed during July and the early part of August. Generally the customers followed the instructions in the book in sending in their orders. A substantial number of these various catalogs were distributed to these Iowa customers.

The Chicago mail order house is a large warehouse type of building containing about thirty-three acres floor space, and it is divided into sections. It is nine floors in height, and seven sect-ons, divided by fire walls. The departments are lined up in it according to the natural movement or path of an order, so that the order coming in is handled in the mail opening department where the order is opened, cash removed and customers' instruction read, and on to the index department where the customers' labels and the addresses are made from stencils, then to entry typing department where the orders are typed provided they call for merchandise from more than one department, and then to the schedule department where they are scheduled as to the time that they will reach the shipping platform, then into [fol. 41] the merchandise divisions where the stocks are carried where the merchandise is assembled and filled, and then conveyed to the assembly rooms where the various merchandise which customers order is assembled together into one container, packed or wrapped and labeled and stamped. From there on to the shipping department, either the postoffice or the shipping docks or other means of transportation.

Between 2,500 and 5,000 employees are engaged either directly or indirectly in the filling of orders and the Chicago mail order house serves Alabama, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Ohio, Tennessee and Wisconsin. The mail order plant at St. Paul, Minnesota, is like the Chicago house except it is not quite as large. I would judge it to be about 75% as large. It serves Iowa, Michigan, Minnesota, Montana, North Dakota, South Dakota and Wisconsin. The Kansas City mail order house is smaller than the Chicago house and larger than the St. Paul house. It serves Arkansas, parts of Iowa, Kansas, Missouri, Nebraska and Oklahoma.

An Iowa customer of the mail order department would either send in his order direct to the mail order house or give it to the desk clerk in one of the retail stores. The customer designates the method of transportation and he either remits at the time of the order or the order is sent

C. O. D. or the company extends credit. Where credit is extended, a minimum payment of not less than 10% of the selling price of the goods is required with the order. 10% of the company's mail order business is done on the installment basis. The company uses the service of a national reporting agency for reports on credit qualifications of a customer and the average rejections are 38%. Some orders are not filled for the reason that we do not have the mer- [fol. 42] chandise in stock or the customer fails to give specifications as to size or color, etc.

Offer: Mr. Ball: It is stipulated by and between counsel for both parties that Exhibit "I", being the notice served upon this company by the Iowa State Board of Assessment and Review, and received as indicated by the stamp on it, March 1, 1938, may be received in evidence.

Mr. Bookin: You have the order here, too, don't you?

Mr. Ball: Yes. It is also stipulated that attached to Exhibit "I" and forming a part thereof, is the resolution and order of the Iowa State Board of Assessment and Review consisting of four typewritten pages. It is also stipulated that this notice together with its attached copy of the order was served upon the legal representative of this company on the 28th day of February, 1938.

Q. What is the fact as to whether or not Montgomery Ward & Company holds a permit issued under Section 11 of the Iowa Sales Tax Law, as a retailer?

A. They do hold such permit.

Q. What is the fact as to whether or not the company does any act within the State of Iowa with respect to sales which are made in response to orders received by mail directly from Iowa customers?

Mr. Bookin: Will you read that question?

(Last question read.)

Mr. Bookin: Objected to as incompetent, irrelevant and immaterial to any issue in this case.

A. They perform no act in the State of Iowa.

The Company maintains no detailed records of sales made to individual customers, and the records which are actually kept by the company at its mail order houses serving Iowa residents, or the records kept at the home office

relating to the operations of these mail order houses, do not permit any segregation of sales of merchandise to Iowa [fol. 43] customers or the segregation of sales of merchandise which are used in the State of Iowa. For every customer from which an order is received an index card is created on which the customer's name and address is cut by a stencil cutting machine and the other part of the card is lined for recording frequency of orders, etc. This is the only card kept that includes the names of cash customers. All other papers relating to the order are returned to the customer and the amount of the sales to a particular customer appearing on the stencil card might not necessarily be the same due to omissions, changes in price, substitutions, or credit rejections. The index card is prepared and filled, and because of errors, omissions credit rejections and changes in price, I would state the index does not show a record of the sales.

In order to collect Iowa Use Tax on orders sent by customers direct to our mail order house serving Iowa customers, it would necessary for the company to train the personnel as to what items are taxable under the Iowa Act, change the accounting methods in order to keep an accurate record of taxable sales by state and customers and to establish a record not now maintained of sales by states. Such a record would have to be in the mailing and opening and billing departments. The maintenance of such records would require additional handling of orders in the billing department, the credit department and the adjustment department and in the accounting and statistics departments and the supply department.

The index cards do not show the record of adjustments or returns as they are kept for the purpose of determining whether or not to mail the customer a catalog. It would not be possible to keep the records indicated without setting up additional accounts and records.

[fol. 44] With regard to the prices of items sold by the mail order house and the retail store, I would say that the retail prices are higher than the mail order prices on the same items of merchandise. It would require time to give a receipt to Iowa customers and add much additional time to the time now required to fill orders. At the present time an order goes through the mail order house in four and one-half hours and there is direct relation between the

length of time required to fill an order and the number of complaints made by customers. Customers are dissatisfied with delay.

Q. In the course of the operation of the company's business have any studies been made from the records of the company attempting to show that relationship?

A. They are constantly made and maintained.

(A chart here marked and presented and marked Plaintiff's Exhibit "J".)

Q. I hand you what the reporter has marked Exhibit "J", and ask you if you know what it is? Just answer yes or no.

A. Yes.

Q. What is it?

A. It is a chart showing the relation between the service—time service on order and the complaints from customers.

Q. Now, in referring to service on orders I notice that chart Exhibit "J" has various figures running from 55 to 95. What are those figures representing?

A. Represent the percentage of orders filled on the same day that they are received.

Q. And I notice that under the heading of percentage of complaint are various figures running from 2.50 to 4.50, and I ask you what those figures represent?

A. That is the percentage of complaints to the number of orders.

[fol. 45] Q. And do you know how this chart came to be prepared?

A. This chart was prepared at my request when the percentage or orders on the same day received went down low, in order that I might prove to the operating department that the cost of the slow service was greater than the economy in having a banker carry-over.

Q. And from what records was that chart prepared?

A. The sales and complaint records.

Q. And under whose supervision are those records kept?

A. My own.

Q. And are you personally familiar with those records?

A. I am.

Q. And does this chart form a part of the records of the corporation which you keep and cause to be prepared under your supervision and control?

A. It does.

Q. And do those charts truly represent the actual figures shown by the other records of the corporation?

A. They do.

Offer: Mr. Ball: We now offer in evidence Exhibit "J".

Mr. Bookin: Exhibit "J" is objected to as incompetent, irrelevant and immaterial to any issue in this case; it is objected to as being the result of an opinion or conclusion of the person or persons who prepared the same, a conjecture or speculation on their part; that there was some necessary relationship between service on orders and the percentage of complaint, no foundation laid for assuming that there was any necessary relationship or that certain other elements including the changeability of persons making the order, and various elements of that type, might not otherwise [fol. 46] be responsible; it is a hearsay statement, it is not the best evidence and it has not been properly identified.

The handling of complaints entails cost to Montgomery Ward & Company and on the average no profit is made on orders that result in complaints because the margin of profit is too small. If the percentage of complaints to the total business increase, there would be a corresponding reduction in the profit of the company. Slowing up of the handling of orders does increase the number of complaints. This would decrease the profit.

I have made a study of catalogs and literature put out by other companies engaged in the sale of merchandise through mail orders, and I am familiar with the catalogs of Sears, Roebuck & Company and with the Chicago Mail Order Company and with those issued by Spiegel, May, Stern & Company and with those issued by National Bellas-Hess Company of Kansas City. In the main, the merchandise listed in those catalogs is comparable to the merchandise listed in the Montgomery Ward Catalogs and the majority of it is identical. Spiegel and The Chicago Mail Order Company are located in Chicago. The National Bellas-Hess Company is located in Kansas City. Neither of them operate a mail order house in the State of Iowa. Many remittances to the other mail order houses are sent in envelopes addressed to Montgomery Ward & Company and our practice is to turn them over to the mail order house for which they were intended. The catalogs between the mail order houses are

very competitive and a substantial number of customers deal also with the other mail order houses. The surveys show that approximately 60% of the customers who have a Montgomery Ward & Company catalog also have the catalog of one of the main competitors. The cost of printing a separate catalog for Iowa customers containing different [fol. 47] prices than those quoted to other customers in other states would be prohibitive. All changes from standard pages makes the printing cost very expensive. There would be no means available to us as a mail order company of increasing the price to customers in a particular location other than by printing a separate catalog showing separate prices. The customer's order is made out from the catalog and the price in the catalog is the one we are bound to respect. It would be possible to cover the cost of collecting the Iowa Use Tax without printing a separate catalog for Iowa customers. The sales are disappointing whenever an article in a catalog issued by Montgomery Ward & Company is priced fractionally above the price at which similar merchandising appearing in the catalog of other competing companies is priced. If Montgomery Ward has to collect the tax and its competitor does not, the effect would be to reduce the sales of Montgomery Ward and increase the sales of the competitor who was not required to collect the additional fee from the customer.

On August 1, 1938, there were 598 Montgomery Ward & Company stores throughout the United States. Some of these stores operate in states adjacent to the State of Iowa but have trade areas extending over into the State of Iowa, such as stores located at Maryville, Missouri, Nebraska City, Nebraska, Sioux Falls, South Dakota, Worthington, Fairmont, and Austin, Minnesota, Moline, Illinois. Merchandise is sold on credit to customers of these stores who live in the State of Iowa and delivery receipts for deliveries of merchandise from these stores show that some merchandise was delivered to Iowa customers. Montgomery Ward & Company has not collected any taxes levied by the State of Iowa either upon the sale of merchandise or on the use of the merchandise so sold. These stores keep no records [fol. 48] of customers who purchase for cash except in the few cases where deliveries are made.

In the border towns there are merchants in the town selling to the same trade area.

Mr. Ball: I think at this time you want to introduce that

record you have there. Why don't you stipulate to put it into the record at this time?

Mr. Bookin: That is agreeable to me. Let the record show preliminary proof and identification being waived, it is hereby stipulated that * * *

(Statement of corporation, etc., registered under Iowa Use Tax, etc., here marked plaintiff's Exhibit "K".)

Mr. Bookin: Plaintiff's Exhibit "K", consisting of 18 typewritten pages, and being a record of the domestic corporations registered under the Iowa Use Tax Act, of the foreign corporations registered under the Iowa Use Tax Act, of the out of state firms, not corporations, registered under the Iowa Use Tax Act, of the mail order houses registered under the Iowa Use Tax Act, of the Iowa residents, not corporations registered under the Iowa Use Tax Act, and of the out of state firms, not corporations, registered under the Iowa Use Tax Act, and the respective amounts collected from Iowa citizens and paid to the State Board of Assessment and Review, from the inception of the act, down to June 17, 1938, is to be received in evidence.

Is that all right, Stuart?

Mr. Ball: That's fine.

The Court: Are you offering that now?

Offer: Mr. Bookin: Yes.

Mr. Ball: He is offering that now.

There would be no way to recover the cost of collecting use tax on sales made in these border stores to Iowa customers other than to raise the price of the goods. Since prices in these border stores are maintained on a com-
[fol. 49] petitive basis, any increase in price would reduce the sales, resulting in a reduction of profit.

Q. In the course of your testimony you referred to the schedule of the orders handled in the mail order house. Will you explain a bit more fully what is meant by the schedule?

A. Economy in the operation of a mail order house results from what is called line production, the same as a factory. To avoid typing names and addresses and to facilitate the filling of the orders a system has been devised which makes it possible to send the typed entry sheets from the schedule unit to the various merchandise departments to be filled, and returned to the assembly room and packing floor,

and there be matched up together without the use of the customer's name but simply by the schedules. The schedule is made to each basket in each section of one customer's order every twenty minutes. When the schedule time elapses all of the articles of merchandise that that customer has ordered, regardless of what department it came from are supposed to be assembled in that basket. They are then checked to determine if this is so. If it is, the order is prepared for shipment; if not, the order is delayed until the missing article can be obtained. The delays of course take up space for storing the basket while the missing article is being obtained from the department, and the expense of such handling. The schedule is compared best to the movement of the belt or line or conveyor in a factory that moves at a certain speed and as it passes the workman he does his part, or inserts his bolt as it is passing. By the method of schedule you control the output not only of the house but the output—man hour output of the various individuals working on schedule activities.

No employee of the mail order house lives within the State of Iowa and there are no acts done within the State [fol. 50] of Iowa in regard to any of the orders sent to the mail order house. The company has no means of collecting any amounts or sums, or any machinery presently set up for collecting any sums from Iowa customers by individuals within the State of Iowa, and it would not be possible to do that without increasing the expense of the operation of the mail order business.

I am familiar with the merchandise which is carried in many of the communities in Iowa by other merchants other than by Montgomery Ward & Company and in most of the stores the merchandise is very competitive with the type sold by Montgomery Ward & Company and there is a competitive relationship between the mail order business and business conducted by local retailers in the State of Iowa.

Mr. Ball: It is stipulated and agreed between counsel that Exhibit No. "K" lists all of the corporations, firms, partnerships and the like under the various classifications, which have taken out licenses or which have done any of the acts indicated by the lists themselves, and it is further stipulated and agreed that neither Spiegel, May, Stearn or Spiegel, Incorporated, or the Chicago Mail Order Company, or the National Ballas-Hess Company have taken out any license

—are in any different position today than they were at the time this list was made out?

Mr. Bookin: Yes.

Cross-examination.

I am to some extent familiar with the policy of our retail stores with regard to advertising and I think it is true that such advertising stresses the fact that those articles of merchandise not carried in the store will be ordered by the store for the customer through the use of the catalog. The retail advertising manager gives direction to the retail [fol. 51] stores as to the type of advertising that they shall do. I have never been in the advertising department. I do not know whether the advertisements solicit orders from customers to be shipped from the mail order division.

If a customer purchased merchandise through an Iowa store to be shipped direct to him by mail order, the order being transmitted by the Iowa store, a stencil would be made for the particular customer, if one was not already on file, and if his purchase were sufficient to justify a catalog, one would be mailed to him.

The Delaware Corporation was the first corporation qualified to do business in this state, but this was eliminated when the corporation qualified to do business in this state. With regard to mail orders placed with the store, Montgomery Ward & Company is collecting and paying the use tax. I do not know exactly when this procedure was taken with relation to the original enactment and operation of the Use Tax Act, nor do I know whether the tax is being paid under protest. I have visited the Sioux City store, but I do not believe I have been in any other stores in Iowa.

Exhibits "B", "C" and "D" are the regular spring and summer catalogs for 1938 and in addition to the actual summer catalog some have tip-offs pasted thereto used to convey information to the customer, that is a necessity which is evident after the printing of the catalog.

(A slip attached to Exhibit "C" here marked defendants' Exhibit "C-1".)

Q. May I call your attention to Exhibit "C-1" and ask you if you know what that is? Do you know what that is, Mr. Vaught?

A. Yes.

Q. What is it?

[fol. 52] A. That is a notice to the customer that we are not collecting the Iowa Use Tax.

Q. Was that notice attached as a tip-on, attached to all the catalogs distributed or only to the catalogs distributed in the State of Iowa?

A. I don't know, but it would be my understanding that it would not be necessary to send that tip-on to the catalogs distributed in other states. It is a message to Iowa prospective customers.

Q. How was it possible for your company to get away from this intense standardization you employ to which you testified and segregate the catalogs that went to your Iowa customers for the purpose of placing that tip-on as to those particular catalogs?

A. The catalogs that are mailed into the State of Iowa to Iowa customers had the tip-on put on as an additional activity.

The names of people to whom to mail the catalogs in Iowa were secured from the index or stencils and the index division is segregated into states and into post offices. Eighteen per cent of the total business is credit business. By combining the index with statistics prepared concerning the mail order (credit) business, the amount of the Iowa mail order business could be approximated. Between 85 and 90% of the customers use the order blank or follow the instructions in the catalog in writing the orders, but I do not think the amount of the Iowa business could be definitely established from the statistical data in the mail order department. The State of Missouri has a sales tax, but we do not issue and publish a separate catalog for that state. The State of Texas has no sales tax and we do not publish a separate catalog for that state. The State of Colorado has a sales tax, but we do not publish a separate catalog for that state. I do not know whether the State of California [fol. 53] has a sales tax, but as a matter of fact we do not publish a separate catalog for any state in which we have a mail order house and which state levies a sales tax. With regard to the Illinois sales tax on those orders received from Illinois customers through the mail direct from the customer to the mail order division, we use a separate order blank and a tip-off as a reminder. The order blank has the space for the state sales tax. The order blank shows a space for the tax. In those states where there is a sales tax we have not found it necessary to publish an entirely dif-

ferent catalog, nor have we found it necessary to raise the price of merchandise. I do not know whether we have any catalog stations or places where a desk is maintained with a catalog and an employee of Montgomery Ward & Company is present to assist persons in filling out their mail orders in the State of Iowa or not. We have over a hundred such offices and I would presume that we had such an office in Iowa. The corporation, Montgomery Ward & Company pays the clerk operating a catalog station and my statement this morning to the effect that there are no employees of the mail order house located in Iowa would be incorrect if there are catalog stations located in the State of Iowa. There is, I know, a catalog station in each retail store in Iowa and the store is paid a commission by the mail order department for the expense connected with the employment and wages of the person in the catalog station. This commission plan has not been abolished. I believe the commission is seven per cent of whatever order is received or sent in, and it is credited to the income of the store and the manager's bonus is determined on the basis of the income of the store. Because of this commission the managers of the retail stores attempt to obtain as many mail [fol. 54] order customers as possible. We have attempted to get as many mail order sales through the service desks in the retail stores as we can.

Q. How do you keep a record of your Illinois sales tax on your mail orders from the State of Illinois?

A. The order readers—first, the mail opener if she sees that there is an Illinois address on the order puts the order in a different colored jacket as a flag, to the billing department and the other departments to notify them that that is an Illinois order and must have special handling, and when the order is filled and the billing is done the billers make tabulation of the amounts of the final sale on tabulating sheets that are recapitulated by the accounting department for the final figure. The adjustment department makes record of the sales deductions resulting from returned goods so that may be deducted. I do not know how much time a micromotion study would disclose in connection with this additional work to collect the Illinois tax. Studies have been made to determine the cost.

With regard to the testimony I gave that sixty per cent of the customers who have Montgomery Ward catalogs have catalogs of one or more of our competitors, I will state that

the testimony was based on reports of surveys done by the sales department. I do not know anything about the accuracy of those surveys and they were not done under my supervision and practically everything I testified to was some report somebody had handed to me. I know of nothing that would prevent our company from furnishing the necessary instructions on order blanks concerning the necessity of Iowa customers paying the Iowa use tax. It could be printed just as we print the tip-on telling them that we believe certain parts of the Iowa use tax are unconstitutional and therefore we neither collect nor report the use tax. We could print the converse of that and tell them that thereafter it would be the intention of Montgomery Ward [fol. 55] & Company to collect and pay the use tax. We find from experience that 90% of our customers follow the instructions contained in the order blank. I did not testify this morning that a separate catalog would have to be printed for Iowa if the use tax were to be collected and I did not testify that we would have to raise the price of merchandise sold to Iowa customers if we were required to collect the use tax. I did testify that we would have to raise the price if we incurred the additional expense in collecting the tax if we wished to make the same profit on the transaction. I do not know whether we make the same profit on our Illinois sales as on our Iowa sales. We do collect the tax in Illinois, but we do not know what we make in any one state. The purpose in adding this tip-on to the catalogs was to convey the message therein contained and not for the purpose of intimating to Iowa customers that by mailing their orders to mail order houses outside the state they would be able to secure a two per cent differential over purchases that they might make within the state. In the main, merchandise in our retail establishments is higher priced than identical merchandise maintained in the mail order house. The reason for this is that on the merchandise in the retail store we pay the carriage or transportation charges to the store while in the case of mail order purchases the customer pays the transportation, and a retail service is more expensive than the mail order service. The store managers in their report each week tabulate the value of the orders sent in and the seven per cent commission is in the form of a journal voucher charged and credited to the store each month.

Mr. Ball: It is stipulated by and between counsel that the record may show that Montgomery Ward operates one of two mail order offices within the State of Iowa independent from the retail stores operated in the State of Iowa, and [fol. 56] that the sales made through such order offices have, together with the sales made through the order desks in the retail stores in the State of Iowa, been reported to the state and the use tax thereon collected and returned, since the beginning of the year 1938, and that all payments in connection with such returns, the use tax has been paid under protest.

Redirect examination:

These added records of sales where use tax would be collected would slow up the process of filling the mail orders. Each additional bit of work requires additional people to handle and additional space. In handling the Illinois sales tax no use is made of the index in computing the amount of the sales tax. It is computed from the tabulations made by the billing clerks after the order is filled. Sometimes catalogs are distributed with tip-ons in order to secure a test, that is certain information would be contained on the tip-on and some sent with tip-on and some without and a test of the returns made. To change the printing of order blanks would cost money and there would be an added expense in the insertion and segregation of books containing one order blanks as against another.

Recross-examination:

The tip-on is located close to the order blank and I imagine one having recourse to the order blank could see it.

Redirect examination.

The more difficult an order is to fill the greater is the resistance to the order.

[fol. 57] J. H. Schneider, called as a witness on behalf of the plaintiff, having been duly sworn by the Court, testified as follows:

Direct examination:

I live at Winnetka, Illinois and I am the head of the tax department of Montgomery Ward & Company. I com-

menced work for Montgomery Ward on October 1, 1929, prior to which time I was a certified public accountant. I was general auditor from 1933 to 1935 and since 1935 have been head of tax department. A separate tax department was started in 1935 and I am responsible for the preparation of all sales, use, income and other excise tax returns and the making of tax payments and the supervision of all accounting data necessary in order to prepare the tax returns. It is necessary for my department to issue detailed procedures to the various branches, particularly in the collection of sales tax in order to enable them to administer properly the collection of the sales tax. Illinois has a sales tax and Montgomery Ward & Company attempts to collect an amount to cover the increased cost from that business resulting from the imposition of this tax. The Illinois tax went into effect in 1933 and it is in the nature of a tax on the retailer rather than on the customer which means that any collection must be made in the form of an addition to the sales price in order to be compensated for the expense of paying the tax. When I stated that Montgomery Ward & Company attempted to collect an amount to cover the increased cost of doing business resulting from the imposition of this tax I meant the increase resulting directly from the tax and not the increase in the cost of business resulting from the collection. We attempted to do this by placing a tip-on similar to what we have in these catalogs on the catalog sent to Illinois customers and about a year later we found it slightly more economical to put this same tax [fol. 58] notice on the order blank that we placed in the back of the catalog, and in order to facilitate the computation of the tax we placed a little schedule bracket familiar in sales tax states. There has been no change in the method of presenting that notice to the Illinois customers. We found that after this notice was sent to the Illinois customers that only 75% of them sent in an amount to cover this additional tax. That experience has remained the same. When an Illinois customer fails to remit an amount to cover the tax, we do not withhold the filling of the order but we send a due bill for the deficiency and our records show that 58% of the due bills issued are not collected. The procedure is that in all deficiencies less than two cents no due bill is sent. The larger the amount of the individual due bill the greater portion of them will be collected and conversely the smaller the

amount of the due bill the greater the proportion that won't be collected. Basing my answer on my experience in the handling of Illinois Retailers Occupation Tax and assuming the tax on the use of merchandise ordered by Iowa customers from one of the mail order houses serving Iowa residents amounted to $10,000 for a given period, I would state that Montgomery Ward would be able to collect $8,550.00. I have made a study of other states relating to the cost of the collection of sales tax in those states having such a tax and the procedure used in handling the sales tax in those states is identical to the procedure in Illinois and the studies I have made corroborate my statement concerning the estimate of the cost of collecting the Iowa use tax under the Chicago, Illinois mail order house. Based upon my general experience in the collection of sales taxes, I would state that in my opinion the amount of tax collected of a possible $10,000 in Iowa use tax would not exceed $8,550.00. The procedure in the collection of sales tax in all states having [fol. 59] such a tax has been set up under my supervision and if we were to collect a use tax in Iowa, we would have to set up an operating procedure practically identical with the system we are now using for the collection of local state sales tax.

EARL RYAN, was called as a witness on the part of the plaintiff and being first duly sworn by the Court, testified as follows:

Direct examination:

I am in the employ of the Secretary of State, examining corporation securities for the Corporation Securities Department and I have charge of the supervision of corporation records in that office. I pass upon corporations that are qualified or incorporated under the laws of Iowa and pass upon application of foreign corporations licensed to do business in the State of Iowa. I have made an examination of the records in the Secretary of State's office and I am able to testify that the Chicago Mail Order Company is not licensed to do business in the State of Iowa as a foreign corporation. The Spiegel Stores Company in Chicago is not licensed to do business in the State of Iowa as a foreign

corporation. The National Bellas-Hess Company is not authorized to do business in the State of Iowa as a foreign corporation. None of these corporations are Iowa corporations.

Examination of Mr. Ryan.

By the Court:

The National Bellas-Hess Company was at one time qualified as a foreign corporation to do business in this state but they filed an affidavit of withdrawal August 4, 1938, and have not been authorized to do business in Iowa since that time.

[fol. 60] J. H. SCHNEIDER, resumed the stand for further examination, and having been previously sworn by the Court, testified as follows:

Direct examination:

The statement that $8,550.00 on the basis of $10,000 of Iowa use tax would be collected includes the additional amount sent Montgomery Ward & Company in response to due bills sent to customers. If a tip-on was used, additional cost would arise in the mail opening department and book and billing departments, adjustment department, the time payment installment unit, the accounting and statistics department and general mail order accounting department which would amount to $938.00. Therefore, the total cost would be made up of the items of direct cost in the sum of $938.00 and indirect cost of $1,450.00 which latter figure is the difference between $10,000 and $8,550.00, or a total cost of $2,388.00. The earliest date upon which Montgomery Ward could start collecting the Iowa use tax by means of the tip-on method would be at the time of the issuance of our next general catalog, on January, 1939. If, instead of the tip-on method, a notice was printed on the order blank the cost would be $890.00 or somewhat less than the other method. This would reduce the total cost to $2,340.00 made up of the same elements as previously enumerated with the slight reduction due to the economy of placing the tax notice on the order blank rather than issuing a separate tip-on.

If neither the notice on the order blank nor tip-on in the catalog method were used and collections were made solely by sending out due bills to customers, then based on the Illinois experience, only 42% of the due bills would be collected. If this method were followed of merely sending out due bills the direct cost would be $1,040.00 plus an indirect cost of $5,800, or a total cost of $6,840.00. If this were the only [fol. 61] method used, the cost would be prohibitive. The Illinois Retailers Occupational Tax makes Montgomery Ward & Company liable for the entire amount of the tax of all of its customers. Identical procedure would have to be used in the collection of the Iowa taxes and the cost would be very much the same. The Montgomery Ward retail stores collect over 99% of the tax and the cost of the collection of this tax would not exceed five per cent of the amount of the sales tax collected. It would not exceed six per cent of the total amount of the tax collected or $600.00 for every $10,000 worth of tax. The index system has not had anything to do in any way in calculating the amount of the Illinois Retailers Occupational Tax paid by Montgomery Ward & Company.

Cross-examination:

A record is kept of due bills set out in various classifications. No record is kept of the particular customer to whom the due bill is sent except that a total record is kept of amounts over 25 cents on all due bills. A follow-up notice is sent to customers on all due bills over 25 cents, but nothing further is done with regard to those from 25 cents to a dollar, but more effort is placed in collection of those for more than a dollar. Intervention of local stores is not used in collecting due bills. The retail stores do aid in the collection of credit accounts where the customer has indicated a desire to make payments at the store. I do not know whether ordinary collections are made on credit accounts of the mail order division by the stores.

STIPULATION

Mr. Ball: It is stipulated and agreed between counsel:

1. That advertisements have been caused to be printed by the retail stores of the petitioner in the State of Iowa, ad-

[fol. 62] vertising not only retail merchandise, but the ability to complete service through the use of the catalog.

2. That the cancellation of the petitioner's license to do business in the State of Iowa as a retailer, would cause irreparable injury to the petitioner, through the loss of customers' trade, good-will, and so forth, occasioned by the cessation of the store business, and that result would be obtained through the cancellation of the permit to do a retail business, or to engage in business as a foreign corporation.

Mr. Bookin: And,

3. That retail stores are instructed to include in their advertising information to the public relative to the availability of the catalog service at the stores.

Mr. Ball: Let the record show that all of the petitioner's Exhibits "A" to "K" inclusive, that might not have been previously formally offered, are not at this time offered in evidence.

The Court: Exhibit "C-1", notice to customers that we are not collecting use tax, has not been offered.

Mr. Bookin: I now offer in evidence in connection with the testimony of Mr. Vaught, defendant's Exhibit "C-1", being tip-on attached to the rear of Exhibit "C", or attached to the inside cover of Exhibit "C".

Mr. Ball: It may also be shown as a stipulation that similar tip-ons appear in the back of catalogs Exhibits "B" and "D", and were used in connection with the distribution of the spring and summer catalogs for the year 1935 to Iowa customers.

* * * * * * *

STIPULATION

Mr. Bookin: It is stipulated by any between counsel that the records will show that Montgomery Ward & Company made its first use tax return on April 20, 1938, for the quarterly period beginning January 1, 1938, and through [fol. 63] March of 1938 and that said quarterly return was made at the time of or subsequent to the institution of the present action and that the return made covered only such sales of merchandise to the Iowa customers with which

their stores located in the State of Iowa had had some connection and sales made by order offices, if such order offices were in operation.

* * * * * * *

Mr. Ball: It is stipulated between counsel that at the present time order offices are operated by Montgomery Ward & Company at Osage, Charles City, Atlantic and Red Oak, Iowa, and that matter of handling the salaries of the employes of those order offices is as indicated by the testimony of Mr. Vaught, and that the sales made by these order offices are included in the use tax returns made subsequent to the opening of any of them——

Mr. Bookin: If such returns have been made.

Mr. Ball: If any such use tax returns have been made.

Evidence closed.

DESCRIPTION OF PLAINTIFF'S EXHIBITS, "A" TO "K" INCLUSIVE

"A"—Certified Copy of Application of Montgomery Ward & Co., to Secretary of State for authority to transact business in Iowa as a foreign corporation.

"B"—Catalogue—Spring & Summer, 1938—For Chicago.

"C"—Catalogue—Spring & Summer, 1938—For St. Paul.

"D"—Catalogue—Spring & Summer, 1938—For Kansas City.

"E"—Catalogue—Fall & Winter, 1937-38—For St. Paul.

"F"—Catalogue—Fall & Winter, 1937-38—For Chicago.

[fol. 64] "G"—Catalogue—Fall & Winter, 1937-38—For Kansas City.

"H"—Form of Order Blank used in all general catalogues and all others from Iowa Use Tax date to present.

"I"—Notice served on Company by Board of Assessment & Review.

"J"—Chart showing relation between Time Service and Complaints of Customers.

"K"—Record of foreign corporations registered, and mail order houses, Iowa residents, etc., and amounts collected, to June 17, 1938.

[fol.64] EXHIBIT "K"

Part 1

Domestic Corporations Registered Under Section 8 of Iowa Personal Property Use Tax Law for Sales from Out-of-State Locations for Use in Iowa

Reg. No.	Name and Address	Tax Paid
100013	A. Y. McDonald Mfg. Co., Dubuque, Iowa	No Tax
100021	Beauty Utilities of Iowa, Waterloo, Iowa	$ 139.69
100045	Shotwell-Carver Co. Inc., Des Moines	262.26
100077	Consumers Coal & Supply Co., Dubuque, Iowa	No Tax (Canc.)
100078	L. W. Ramsey Co., Davenport, Iowa	11.49
100079	Clay Equipment Corporation, Cedar Falls, Iowa	No Tax
[fol.65]		
100080	Oskaloosa Ice Co., Oskaloosa, Iowa	No Tax (Canc.)
100081	Schoits Engineering Works, Inc., Waterloo, Iowa	No Tax
100082	City Coal Company, Albia, Iowa	No Tax (Canc.)
100083	Electrical Engineering & Cons. Co., Des Moines, Iowa	No Tax
100086	Drake Hardware Company, Burlington, Iowa	No Tax
100088	Fullmer Builders Supply Co., Ottumwa, Iowa	No Tax (Canc.)
100089	Citizens Service Company, Swea City	No Tax
100095	Farmers Grain Co., Larchwood, Iowa	No Tax
100097	Berry Lumber Co., Onawa, Iowa	No Tax (Canc.)
100098	Automatic Gravel Products Co., Muscatine, Iowa	No Tax
100099	Sibley Cement Company, Sibley, Iowa	63.29
100100	Shell Lumber Company, Sibley, Iowa	.98
100101	Will H. Zaiser Specialty Co., Des Moines, Iowa	No Tax
100102	The Mastercraftsmen, Inc., Des Moines, Iowa	No Tax
100103	Berkowits Envelope Co. of Iowa, Des Moines, Iowa	1.77
100104	The McGregor Company, Oskaloosa, Iowa	No Tax
100105	General Air Conditioning Corp., Cedar Rapids, Iowa	No Tax
[fol.66]		
100106	Castone Products Co., Cedar Rapids, Iowa	No Tax
100107	Tribune Publishing Co. Inc., Cedar Rapids, Iowa	No Tax
100108	The Luberger Company, Cedar Rapids, Iowa	No Tax
100109	H. Trenkle Co., Dubuque, Iowa	49.71
100110	Mets Manufacturing Co., Dubuque, Iowa	No Tax
100111	The National Yeast Co. Inc., St. Olaf, Iowa	No Tax

EXHIBIT "K"—Part 1—Continued

Reg. No.	Name and Address	Tax Paid
100112	Niemeyers, Hawarden, Iowa	No Tax (Canc.)
100113	Manning McComb Co., Des Moines, Iowa	No Tax (Canc.)
100114	Pure Ice Company, Centerville, Iowa	No Tax
100115	Amana Society, Amana, Iowa	No Tax (Canc.)
100116	Master Ref. Locker Systems, Sioux City, Iowa	No Tax
100117	T. R. Gurney Oil Company, Sioux City, Iowa	2.88
100118	The Phillip Bernard Co., Sioux City, Iowa.	1.75
100119	Johnson Biscuit Co., Sioux City, Iowa	No Tax (Canc.)
100121	Lehigh Sewer Pipe & Tile Co., Ft. Dodge, Iowa	24.18
100120	L. O'Harrow Co., Sioux City, Iowa	No Tax (Canc.)
100122	Chas. Naeckel's Sons Co., Davenport, Iowa	No Tax
[fol.67]		
100123	Sieg-Mason City Co., Mason City, Iowa	No Tax (Canc.)
100124	Palmer School of Chiropractic, Davenport, Iowa	172.32
100125	U. S. Broom Company, Inc., Davenport, Iowa	No Tax
100126	Coughlin Sales Company, Davenport, Iowa	No Tax
100127	Strieter Motor Company, Davenport, Iowa	No Tax
100128	Red Jacket Manufacturing Co., Davenport, Iowa	No Tax
100130	Omaha Standard Body Corp., Council Bluffs, Iowa	3.02
100133	Des Moines Steel Bldg. Co., Des Moines, Iowa	1,100.71
100136	Luana Farmers Coop. Society, Luana, Iowa	No Tax
100137	Uehtorff Weiser Co., Davenport, Iowa	109.81
100138	Florida Fruit Co., Dubuque, Iowa	No Tax (Canc.)
100139	Ben S. Noble Lumber Co., Ida Grove, Iowa	No Tax
100140	Rainbow Oil Co., Dubuque, Iowa	No Tax (Canc.)
100141	Kruber-Morgan Elec. Co., Cedar Rapids, Iowa	No Tax (Canc.)
100142	Star Spark Arrestor Co., Oskaloosa, Iowa.	No Tax (Canc.)
100143	Riverside Fuel Co., Davenport, Iowa	No Tax (Canc.)
[fol.68]		
100144	Kelling Wilkinson Oil Co., Davenport, Iowa	1.24
100147	Bartles-Shepherd Oil Co., Waterloo, Iowa.	59.49
100153	Johnson Service Company, Des Moines, Iowa	33.99
100161	The Advertising Novelty Co., Newton, Iowa	No Tax

Exhibit "K"—Part 1—Continued

Reg. No.	Name and Address	Tax Paid
100297	Grand Recreation Corporation, Des Moines, Iowa	10.19
100298	Des Moines Incubator Co., Des Moines, Iowa	.21
100309	The Van Meter Co., Cedar Rapids, Iowa	No Tax
Total Amount of Tax Paid		$2,048.98
Total Number of Retailers		63

Part 2

Foreign Corporations Registered Under Section 9 of Iowa Personal Property Use Tax Law for Collection of Tax on Sales for Use in Iowa

Reg. No.	Name and Address	Tax Paid
100092	Dimock, Gould & Co., Moline, Illinois	$ 239.78
100151	Lewis Mfg. Company, Walpole, Mass.	No Tax (Canc.)
[fol.69]		
100155	Iron Fireman Corporation, Cleveland, Ohio	No Tax
100230	Farmers Co-op. Oil Co., Canton, S. Dak.	17.75
100231	M. Engebretson, Sioux Falls, S. Dak.	No Tax
100238	The Texas Company, Lawrenceville, Ill.	11.62
100242	Paul Oldenburg Co., Elmore, Minn.	No Tax
100248	Producers Creamery of Moline, Moline, Illinois	228.86
100288	C. A. Dunham Company, Chicago, Illinois	347.59
100350	The Gregory Laboratory, White Hall, Ill.	18.95
100356	Ashe Lockhart, Inc., Kansas City, Mo.	1.59
100361	Haver-Glover Laboratories, Kansas City, Mo.	1.00
100368	Lyons Band Instrument Co., Chicago, Ill.	No Tax
100382	Claude Neon Federal Co., Chicago, Ill.	No Tax
Total Amount of Tax Paid		$ 867.14
Total Number of Retailers		14

[fol.70]

Part 3

Out of State Firms (not Corporations) Registered for Collection of Tax under Sections of Iowa Personal Property Use Tax Law

Reg. No.	Name and Address	Tax Paid
100055	Associated Sales Distributors, Minn., Minn.	$ 31.12
100063	Matthews Shirt Co., Chicago, Ill.	158.15
100292	C. C. Anker, Chicago, Ill.	4.19
100306	Harold Griffith, Livonia, Mo.	2.35 (Canc.)
100311	Manitowoc Knitting Mills, Manitowoc, Wis.	15.09

Exhibit "K"—Part 3—Continued

Reg. No.	Name and Address	Tax Paid
100312	Edwin C. Barnes & Bros., Chicago, Ill.	No Tax
100352	Cleveland Studio, Omaha, Nebr.	No Tax
100377	D. D. Tarpy, Omaha, Nebr.	No Tax
100383	Hand Tooled Leather Co., Rockford, Ill.	No Tax
100388	Quincy Leather Company, Quincy, Ill.	No Tax
Total Amount of Tax Paid		$ 210.90
Total Amount of Retailers		10

[fol.71] Part 4

Mail Order Houses Registered Under Section 8 of Iowa Personal Property Use Tax Law but not Included in Statement for Foreign Corporations Operating Under This Section

Reg. No. 100006
Montgomery Ward & Co.
Chicago, Illinois

B-37	$ 8.38
C-37	116.50
D-37	80.31
A-38	1,339.56
Total	$1,544.75

Reg. No. 100366
Sears, Roebuck & Co.
Chicago, Illinois

B-37	$1,474.48
C-37	1,621.71
D-37	2,602.64
A-38	2,154.19
Total	$7,853.02

[fol.72] Part 5

Iowa Residents (not Corporations) Registered Under Section 8 of the Iowa Personal Property Use Tax Law for Collection of Tax on Sales for Use in Iowa

Reg. No.	Name and Address	Tax Paid
100001	John M. Dunkerton, Des Moines, Iowa.	$ 52.47
100008	B. & M. Service Co., Des Moines, Iowa.	254.50
100019	Movie Photo Co., Des Moines, Iowa.	12.42
100036	Emory Jones, Des Moines, Iowa.	320.10
100049	Nowlin's Distributing Co., Des Moines, Iowa.	144.43
100066	Iowa Road Blg. Co., Des Moines, Iowa.	1,273.32
100069	Harry Waite, Hawarden, Iowa.	46.73
100152	Mrs. Elsia H. Carle, Muscatine, Iowa.	No Tax
100154	Miss Edith J. Cranston, DeWitt, Iowa.	5.53
100156	H. P. Braun, Des Moines, Iowa.	4.89
100157	V. V. Wonderling, S. Sioux City, Neb.	1.95

EXHIBIT "K"—Part 5—Continued

Reg. No.	Name and Address	Tax Paid
100160	The Vernon Company, Newton, Iowa...	No Tax
100162	R. W. Eldridge, Waterloo, Iowa.....	10.63
100168	Mr. and Mrs. Fred Merritt, Mapleton, Iowa.....	1.34
100169	W. H. Orr, Clear Lake, Iowa.....	8.71
[fol.73]		
100172	C. W. Stipp Co., Des Moines, Iowa....	No Tax
100173	Miss Katharine Martin, Des Moines, Iowa.....	2.87
100175	Mrs. Nina B. Sugg, Clinton, Iowa.....	15.21
100176	Mollie Hird, Dubuque, Iowa.....	3.85
100177	Zita L. Baker, Cresco, Iowa.....	4.80
100174	Mrs. G. D. Suter, Des Moines, Iowa....	1.85 (Canc.)
100180	Mrs. A. F. McCoy, Lanesboro, Iowa...	6.42
100181	Mrs. H. D. Patterson, Nevada, Iowa...	6.21
100182	Miss Grace Negus, Reinbeck, Iowa....	4.23
100183	Nora Dundore, Perry, Iowa.....	1.77
100184	Mrs. Verva Bixler, Clarence, Iowa.....	8.58
100185	Blanche L. Paul, Muscatine, Iowa.....	17.79
100186	Ruth V. Adams, Marshalltown, Iowa..	7.13
100187	Mrs. Henrietta H. Burnham, Griswold, Iowa.....	2.35
100188	Bertha L. Marsh, Cherokee, Iowa.....	10.26
100189	Elsie McNiel, Cedar Rapids, Iowa.....	5.87
100190	Johanah Larsen, Onawa, Iowa.....	2.60
100191	Mrs. J. L. Stewart, Maquoketa, Iowa...	5.14
[fol.74]		
100192	Lillian Huntington Lockwood, Waterloo, Iowa.....	6.54
100193	Miss Laura M. Pedersen, Des Moines, Iowa.....	7.90
100195	Mrs. Marie T. Douglass, Cedar Rapids, Iowa.....	4.84
100196	Mrs. Lela O. Kish, Riverton, Iowa.....	1.45
100197	Mrs. Curtis Sutton, Anamosa, Iowa.....	7.68
100198	Belle C. Collett, Ottumwa, Iowa.....	2.20 (Canc.)
100200	Mrs. Cora H. Hill, Badger, Iowa.....	3.88
100202	Mrs. Ralph Janssen, Ackley, Iowa.....	3.65
100203	Anna Fitzgerald, Pocahontas, Iowa.....	3.18
100204	Estelle E. Claussen, Clinton, Iowa.....	3.55
100206	Mrs. O. M. Bundy, Cedar Rapids, Iowa.	6.05
100207	Mrs. Grace Collins, Monmouth, Iowa...	4.36 (Canc.)
100208	Mrs. Minnie Meier, Waukon, Iowa.....	2.19
100209	Mrs. Rose Severson, Davenport, Iowa..	No Tax
100210	Mrs. Pearl Edwards, Marengo, Iowa....	14.67
100211	Margaret Shanewise, Waverly, Iowa....	6.51
100212	Ferna E. Leeper, Newell, Iowa.....	5.66
[fol.75]		
109214	Mrs. Hilda Ruser, Bennett, Iowa.....	2.01
100216	Mrs. Bess Steinmetz, Muscatine, Iowa.	4.43

EXHIBIT "K"—Part 5—Continued

Reg. No.	Name and Address	Tax Paid
100217	Mrs. A. Lela Johnson, Waterloo, Iowa..	2.12 (Canc.)
100218	Thomas N. Naudain, Sioux City, Iowa..	18.20
100219	Mrs. E. L. Rhodes, Sioux City, Iowa....	9.32
100221	Miss Amanda Looft, Swea City, Iowa...	7.17
100222	Mrs. Angie B. Noble, Charles City, Iowa	35.69
100223	Mrs. Ida C. Bell, Sioux City, Iowa.....	13.86
100224	Miss Lena M. Johnson, Sioux City, Iowa	4.59
100226	Mrs. Ruth M. Edwards, Marengo, Iowa	17.75
100227	Mrs. Ruth Rice, Cedar Rapids, Iowa..	11.00
100229	Mrs. Lee McManes, Geneva, Iowa....	2.37
100232	Mrs. Geo. S. Klahm, Davenport, Iowa.	3.45
100233	Miss Minnie Harrison, Waterloo, Iowa.	6.43
100234	Mrs. Teresa Peterson, Davenport, Iowa	16.87
100236	Hasel A. Clyde, Osage, Iowa.....	10.13
100237	Kunie & Nelson, Malvern, Iowa.....	No Tax (Canc.)
[fol.76]		
100244	Mrs. Bess Adams, Iowa City, Iowa....	6.34
100245	George E. Krepelka, Osage, Iowa.....	9.79
100246	C. A. Kay, Centerville, Iowa.....	.12
100247	Luella Wall, Des Moines, Iowa.....	13.00
100251	Mrs. Anna Bentrude, Waterloo, Iowa..	2.52
100253	Daisy Haney, Keosauqua, Iowa.....	1.71
100254	A. B. Carstensen, M. D., Linn Grove, Iowa.....	1.89
100255	Mary Ellen O'Mara, Fort Dodge, Iowa	2.79 (Canc.)
100256	Mrs. W. P. Donald, Ames, Iowa.....	No Tax
100257	Mrs. Nelle C. Culver, Anthon, Iowa...	10.97
100258	Mrs. Clara Ford, Burlington, Iowa....	11.82
100259	Mrs. Gertrude E. Dow, Davenport, Iowa.....	7.68
100260	Margaret Bower, Marble Rock, Iowa..	7.38
100261	Mrs. Alice D. French, Des Moines, Iowa	11.84
100262	Marian M. Kemp, Muscatine, Iowa...	No Tax
100264	Mrs. Viola M. Haddad, West Union, Iowa.....	5.34
100265	Mrs. Clarence Van Wechel, Orange City, Iowa.....	3.95
100266	Mrs. R. C. Mahaffa, Des Moines, Iowa.	No Tax
100267	C. A. Merritt, Clarence, Iowa.....	8.21
[fol.77]		
100268	Nellie M. Du Mond & Margaret, Waterloo, Iowa.....	29.54
100269	D. M. Stewart, Chapin, Iowa.....	No Tax
100271	Mrs. Vera K. Findly, Iowa City, Iowa.	21.67
100272	Mrs. Nettie F. Wood, Council Bluffs, Iowa.....	12.43
100273	Mrs. E. C. Eastin, Ft. Madison, Iowa..	14.24
100274	Mabel Carney, Sioux City, Iowa.....	6.02
100276	Mrs. Ethel M. James, Columbus Junction, Iowa.....	No Tax

EXHIBIT "K"—Part 5—Continued

Reg. No.	Name and Address	Tax Paid
100277	Mrs. A. Dennison, Bellevue, Iowa	9.41
100278	Mrs. Helen Piffer, Indianola, Iowa	No Tax
100280	G. E. Offord, Clinton, Iowa	57.65
100283	Mrs. Mary Wilhite, Manning, Iowa	3.67
100284	Mrs. Delsie Berg, Fort Dodge, Iowa	No Tax
100285	Miss Effie Holt, Boone, Iowa	.37
100286	Mrs. Anna Schmidt, Davenport, Iowa	5.10
100287	Mrs. Frank Neely, Monroe, Iowa	5.22
100289	Mrs. Fay Mayo, Des Moines, Iowa	4.19
100290	Mrs. Henry O. Timmerman, Sheffield, Iowa	1.63
100291	Mrs. Laura Graham, Davenport, Iowa.	1.84
[fol.78]		
100293	P. A. Graf, Mason City, Iowa	11.47
100295	Mrs. Mabel Kirchgatter, Iowa Falls, Iowa	3.30
100301	Mrs. T. A. Bell, Anita, Iowa	5.39
100303	Mrs. Emma B. Richardson, Washington, Iowa	23.00
100304	Daisy C. Rees, Ottumwa, Iowa	5.83
100308	Mrs. Maude Runkle, Lisbon, Iowa	3.52
100310	Miss Mabel M. Merritt, Ottumwa, Iowa	No Tax
100313	Isabel Hora, Boone, Iowa	.71
100324	Mrs. Jessie Dunsmore, Mason City, Iowa	5.02
100325	Mrs. T. L. Rogerson, Eagle Grove, Iowa	1.27
100328	Fred Golden, Burlington, Iowa	23.03
100329	Mrs. Sarah T. Shaefer, Fort Dodge, Iowa	No Tax
100330	Mrs. Vae S. Hawker, West Liberty, Iowa	5.11
100344	Wiley Whitehead, Marengo, Iowa	5.85
100351	Mrs. Anna Roach, Mapleton, Iowa	6.01
100362	Anna T. Mueller, Davenport, Iowa	1.71
100364	Mrs. A. J. Preston, Muscatine, Iowa	1.71
100367	Mortuary Supply Co., La Porte City, Iowa	No Tax
[fol.79]		
100369	Mrs. Elda Poppleton, Sioux City, Iowa	1.60
100370	Mrs. Norine Bensmiller, Ottumwa, Iowa	3.14
100373	Mrs. Eleanor T. Severance, Sutherland, Iowa	No Tax
100375	D. B. Tuttle, Decorah, Iowa	No Tax
100378	Miss Gladys Campbell, Mt. Pleasant, Iowa	No Tax
100381	M. A. Bates, Seymour, Iowa	No Tax
100384	Mrs. John Block, Burlington, Iowa	No Tax
100386	Peter E. Greteh, Remsen, Iowa	No Tax
100393	Arthur E. Radabaugh, Colesburg, Iowa.	No Tax
100394	Mrs. June Hutchcroft, Mediapolis, Iowa	No Tax

Exhibit "K"—Part 5—Continued

Reg. No.	Name and Address	Tax Paid
100395	William Aberly, Riceville, Iowa	No Tax
100396	J. A. Jensen, Cresco, Iowa	No Tax
100397	Mrs. Art Kohl, Anamosa, Iowa	No Tax
100398	F. J. Merrill, Charles City, Iowa	No Tax
Total amount of tax paid		$2,880.15
Total number of retailers		136

[fol.80]

Part 6

Foreign Corporations Registered for Collection of Use Tax Under Provisions of Section 8 of Iowa Personal Property Use Tax Law

Reg. No.	Name and Address	Tax Paid
100002	R. C. A. Mfg. Co., Inc., Camden, N. J.	$ 327.25
100003	Ohmer Register Co., Dayton, Ohio	71.51
100004	Illinois Oil Co., Rock Island, Ill	578.25
100005	Westinghouse Electric Elevator Co., Chicago, Ill	13.82
100007	The Liquid Carbonic Corp., Chicago, Ill	1,146.75
100009	Singer Sewing Machine Co., New York, N. Y	30.63
100010	Allis-Chalmers Mfg. Co., West Allis, Wisconsin	428.63
100011	U. S. Tire Dealers Mutual Corp., New York, N. Y	23.07
100012	General Electric X-Ray Corp., Chicago, Ill	1,093.61
100014	Toledo Scale Co., Toledo, Ohio	No Tax
100015	Carbide & Carbon Chemicals Corp., New York, N. Y	87.73
100016	The Linde Air Products Co., New York, N. Y	176.11
100017	The Prest-O-Lite Co., Inc., New York, N. Y	72.98
100018	Burroughs Adding Machine Co., Detroit, Michigan	3,266.30

[fol.81]

100020	Skelly Oil Co., Kansas City, Missouri	No Tax
100022	International Bus. Machine Corp., New York, N. Y	545.21
100023	Ideal Equipment Co., Morristown, Minn	7.79
100024	Lowry-Miller Lumber Co., Princeton, Missouri	No Tax
100025	American-LaFrance & Foamite Industries, Inc., New York, N. Y	248.33
100026	Fruehauf Trailer Co., Detroit, Michigan	No Tax (Canc.)
100027	The Michigan Silo Co., Peoria, Ill	204.70
100028	J. D. Adams Co., Indianapolis, Ind	3,568.37

EXHIBIT "K"—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
100029	Des Moines Nettleton Co., Inc., Syracuse, N. Y.	No Tax (Canc.)
100030	Penn Oil & Supply Co., St. Joseph, Missouri	153.02
100031	Griffin Wheel Co., Chicago, Illinois	737.52
100032	Marchant Calculating Co., Emeryville, Calif	20.00
100033	Monumental Sales & Mfg. Co., St. Cloud, Minn	1,264.99
100034	Portable Elevator Mfg. Co., Bloomington, Ill	No Tax
100035	Schmoller & Mueller Piano Co., Omaha, Nebr	No Tax
[fol.82]		
100037	E. I. Du Pont De Nemours & Co., Wilmington, Delaware	429.69
100038	Underwood Elliott & Fisher Co., New York, N. Y	701.51
100039	Cork Insulating Co., Chicago, Ill	No Tax
100040	J. & R. Motor Supply Co., Chicago, Ill.	No Tax (Canc.)
100041	Viscosity Oil Co., Chicago, Illinois	76.01
100042	Jewell Tea Co., Inc., Barrington, Ill	3,208.33
100043	Cook Paint & Varnish Co., Kansas City, Missouri	17.23
100044	Roy Bennett, Inc., Quincy, Ill	No Tax (Canc.)
100046	Decorators Wall Paper Co., Inc., St. Louis, Missouri	No Tax
100047	Sanitary Scale Co., Belvidere, Ill	33.35
100048	Ed. Friedrich Sales Corp., San Antonio, Texas	29.48
100050	General Tire & Rubber Co., Akron, Ohio	271.41
100051	Ditto, Inc,, Chicago, Ill	525.57
100052	Continental Car-Na-Var Corp., Brazil, Ind	76.69
100053	Lewistown Pipe Co., Ft. Wayne, Ind	No Tax
100054	The B. F. Goodrich Co., Akron, Ohio	132.37
100056	Complex Company, Chicago, Ill	No Tax
100057	Clarin Mfg. Co., Chicago, Ill	49.82
[fol.83]		
100058	Monroe Calculating Machine Co., Inc. Orange, N. J	107.73
100059	Ceco Steel Products Corp., Omaha, Neb.	641.19
100060	Standard Oil Co., Chicago, Ill	8,460.15
100061	Goodman Jewelers Inc., St. Paul, Minn.	No Tax
100062	Allied Laboratories, Inc., Kansas City, Mo	1,776.14
100064	Wheeling Corrugating Co., Wheeling, W. Va	No Tax
100065	W. G. Woodward Co., St. Louis, Mo	No Tax (Canc.)

EXHIBIT "K"—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
100067	Royal Typewriter Co., Inc., New York, N. Y.	12.38
100068	Fairbanks, Morse & Co., Omaha, Neb.	428.78
100070	H. N. Greis, Trustee, Deep Rock Oil Corp., Chicago, Ill.	163.97
100071	Stors Supply Co., Omaha, Nebraska	110.48 (Canc.)
100072	Shell Petroleum Corp., St. Louis, Mo.	1,200.77
100073	The Creamery Package Mfg. Co., Chicago, Ill.	1,024.48
100074	General Electric Co., Schenectady, N. Y.	5.53
100075	The J. B. Ford Sales Co., Wyandotte, Michigan	75.99
100076	Crane Co., Davenport, Iowa	510.24
100084	Air Reduction Sales Co., New York, N. Y.	60.27
[fol.84]		
100085	Frigidaire Division, Gen. Motors Sales Corp., Des Moines, Ia.	127.77
100087	Armour & Company, Chicago, Ill.	92.59
100090	Blue Valley Creamery Co., Chicago, Ill.	No Tax
100091	The City Ice & Fuel Co., Chicago, Ill.	23.90
100093	Socony-Vacum Oil Co., Inc., St. Louis, Missouri	99.10
100094	U. S. Sanitary Specialties Corp., Chicago, Ill.	126.04
100096	The Louis Allis Co., Milwaukee, Wisconsin	No Tax
100129	Sherman's Associated Stores Co., Cleveland, Ohio	No Tax
100131	American Type Founders Sales Corp., Elizabeth, N. J.	No Tax
100132	Eastman Kodak Stores, Inc., Des Moines, Iowa	No Tax (Canc.)
100134	Jageman-Bode Co., Keokuk, Iowa	No Tax (Canc.)
100135	Hinde & Dauch Paper Co., Sandusky, Ohio	No Tax
100145	Certain - Teed Products Corp., New York, N. Y.	667.54
100146	Western Newspaper Union, Sioux City, Iowa	No Tax
100148	Dutch Mill Oil Co., Madison, Wisconsin	8.97 (Canc.)
100149	Oliver Farm Equipment Sales Co., Chicago, Ill.	11.14
[fol.85]		
100150	T. E. Ibberson Co., Minneapolis, Minn.	818.70
100158	Kennedy & Parsons Co., Omaha, Nebr.	No Tax
100159	Westinghouse Electric Supply Co., Chicago, Ill.	697.58
100163	Crane Co., Sioux City, Iowa	380.08
100164	Atlas Powder Co., Wilmington, Delaware	9.53

EXHIBIT "K"—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
100165	The National Refining Co., Dubuque, Iowa	93.06
100166	The Austin-Western Road Machinery Co., Aurora, Ill	1,320.21
100167	General Electric Supply Corp., Bridgeport, Conn	No Tax
100170	Rock Island Fuel Co., Rock Island, Ill.	186.78
100171	The Todd Sales Co., Inc., Rochester, N. Y	146.52
100178	Durabilt Steel Locker Co., Aurora, Ill	94.25
100179	The National Cash Register Co., Dayton, Ohio	1,972.29
100194	Remington Rand Inc., Buffalo, N. Y	No Tax
100199	Line Material Co., South Milwaukee, Wis	127.68
100201	Wisconsin Great Lakes Coal & Dock Co., Milwaukee, Wis	56.78
100205	The Sprague Meter Co., Bridgeport, Conn	34.08
[fol.86]		
100213	James Mfg. Co., Fort Atkinson, Wisconsin	609.38
100215	Albert Pick Co., Inc., Chicago, Ill	589.95
100220	The Master Builders Co., Cleveland, Ohio	34.46
100225	Crane Co., Mason City, Iowa	298.72
100228	Central Oil & Grease Co., Rock Island, Ill	99.61
100235	Pure Carbonic, Inc., New York, N. Y	.32
100239	J. I. Case Co., Rock Island, Ill	23.55
100240	Honan-Crane, Inc., Lebanon, Ind	3.30
100241	Graybar Electric Co., Inc., New York, N. Y	3.65
100243	National Poster Exchanges, Inc., Omaha, Nebr	1.49
100249	Victor Adding Machine Co., Chicago, Illinois	No Tax
100250	National Carbide Corp., New York, N. Y	120.78
100252	James Stewart Corp., Chicago, Ill	No Tax (Canc.)
100263	Otis Elevator Co., St. Louis, Mo	89.84
100270	Standard Barber & Beauty Supply Inc., Omaha, Nebr	No Tax
100279	The Pure Oil Company, Chicago, Ill	No Tax
100281	Westinghouse X-Ray Company, Inc., Long Island City, N. Y	526.20
[fol.87]		
100282	Interstate Memorial Co., St. Cloud, Minnesota	8.61
100294	L. G. Balfour Co., Attleboro, Mass	52.86

EXHIBIT "K"—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
100296	Woodstock Typewriter Co., Chicago, Ill.	235.64
100299	The Kelley-Koett Mfg. Co., Inc., Covington, Ky	169.82
100300	Ralston Purina Co., Davenport, Iowa	No Tax (Canc.)
100302	Hercules Powder Co., Wilmington, Delaware	48.42
100305	Gehl Bros. Mfg. Co., West Bend, Wisconsin	No Tax
100307	Ed. Friedrich Sales Corp., San Antonio, Texas	No Tax (Canc.)
100314	Geo. H. Weyer, Inc., Kansas City, Mo.	528.97
100315	Real Silk Hosiery Mills, Inc., Indianapolis, Ind	958.58
100316	Armstrong Cork Products Co., Lancaster, Pa	216.66
100317	Kremers-Urban Co., Milwaukee, Wis	No Tax
100318	Kinsley Laboratories, Kansas City, Mo.	.98
100319	Missouri Valley Serum Co., Kansas City, Kansas	.87
100320	The Fostoria Serum Co., Fostoria, Ohio	4.39
100321 [fol.88]	Norden Laboratories, Lincoln, Neb	207.60
100322	St. Joseph Veterinary Laboratories, St. Joseph, Mo	7.10
100323	Colorado Serum Co., Denver, Colorado	6.29
100326	Deep Rock Oil Corp. of Nebraska	17.23
100327	Oliver Farm Equipment Co., Chicago, Ill	No Tax
100331	Storz Supply Corp., Omaha, Nebraska	34.29
100332	Will Ross, Inc., Milwaukee, Wis	No Tax
100333	Merchants Chemical Company, Omaha, Nebr	No Tax
100334	B. A. Railton Co., Chicago, Ill	113.46
100335	Universal Atlas Cement Co., Chicago, Ill.	No Tax
100336	Westinghouse Electric & Mfg. Co., Pittsburgh, Pa	No Tax
100337	The Corn States Serum Co., Omaha, Nebr	84.23
100338	V. Mueller & Co., Chicago, Ill	113.85
100339	Sunshine State Poultry Lab., Sioux Falls, S. Dak	12.85
100340	Paul B. Elder Co., Bryan, Ohio	3.64
100341	Grain Belt Supply Co., Omaha, Nebraska	14.69
100342	Physicians & Hospitals Supply Co., Minneapolis, Minn	159.05
100343	Natkin & Company, Des Moines, Iowa	77.85
100345	Farmers Merchants Oil Co., Ellsworth, Minn	No Tax

EXHIBIT "K"—Part 6—Continued

Reg. No.	Name and Address	Tax Paid
[fol.89]		
100346	Jensen - Salsbery Laboratories, Inc., Kansas City, Mo.	150.10
100347	The S. E. Massengill Co., Kansas City, Mo.	190.22
100348	National Laboratories Corp., Kansas City, Kans.	1.36
100349	Corn Belt Serum Co., E. St. Louis, Ill.	.06
100353	R. J. Strasenburgh Co., Rochester, N. Y.	1.17
100354	The Warren-Teed Products Co., Columbus, Ohio	No Tax
100355	Sutliff & Case Co., Inc., Peoria, Ill.	374.30
100358	Armour & Co., Vet. Div., Kansas City, Kansas	No Tax (Canc.)
100359	Peoria Barber Supply Co., Peoria, Ill.	46.39
100360	A. W. Co., Inc., of Nebraska, Omaha, Nebr.	508.24
100365	National Theatre Supply Co., New York, N. Y.	152.60
100371	Liberty Laboratories, Inc., Omaha, Nebr.	4.08
100372	Miller-Hasselbalch Co., Omaha, Nebr.	No Tax
100374	Lederle Laboratories, Inc., New York, N. Y.	.95
100376	The Hobart Mfg. Co., Troy, Ohio	237.22
100379	Chemical Distributors, Inc., Chicago, Ill.	No Tax
[fol.90]		
100380	Hillyard Sales Co., St. Joseph, Mo.	No Tax
100385	Skelgas Co., Kansas City, Mo.	No Tax
100387	Nebraska Bridge Supply & Lumber Co., Omaha, Nebr.	No Tax
100389	Peerless Serum Co., Kansas City, Kansas	No Tax
100392	The Long Bell Lumber Co., Kansas City, Missouri	No Tax
100399	Universal Laboratories, St. Louis, Missouri	No Tax
Total amount of tax paid		$48,436.59
Total number of retailers		169

Part 7

Out of State Firms (not Corporations) Registered for Collection of Tax Under Sections of Personal Property Use Tax Law

Reg. No.	Name and Address	Tax Paid
100275	John J. Kroner, Chicago, Ill.	$ 11.98
100357	Guilfoil Serum Co., Kansas City, Kans.	13.66
100363	Dr. Paul Jucknies, Omaha, Nebr.	No Tax
100390	Nelson Laboratories, Sioux Falls, S. Dak.	No Tax
100391	Morton Products Co., Morton, Ill.	No Tax
Total amount of tax paid		$ 25.64
Total amount of retailers		5

EXHIBIT "K"—Part 7—Continued

[fol. 91] Recapitulation

	No. of Accounts	Tax Paid
Part 1	63	$ 2,048.98
Part 2	14	867.14
Part 3	10	210.90
Part 4	2	9,397.77
Part 5	136	2,880.15
Part 6	169	48,486.50
Part 7	5	25.64
Non-Registered Retailers Returns		100.81
Total	399	$63,967.98

Defendant's Exhibit.

EXHIBIT "C-1"

To Our Iowa Customers:

We believe that certain of the provisions of the Iowa Use Tax law as applied to our business, are unconstitutional. Therefore we are not collecting or reporting the Use Tax on mail orders sent by Iowa customers direct to any of our mail order houses.

Until you hear from us to the contrary, mail in your orders just as you have in the past.

Montgomery Ward & Co.

On December 21, 1938, the Court rendered the following

OPINION OF THE COURT

The record shows that the plaintiff is a foreign corporation organized under the laws of the State of Illinois, duly [fol. 92] licensed, under the general statutes regulating such matter, to do business in the State of Iowa, and that such license to do business in the State of Iowa was granted a considerable period of time prior to the enactment of what is commonly known as the Use Tax Act by the legislature of the State of Iowa.

That following the licensing of the plaintiff to do business in the State of Iowa, and up to the commencement of this action, the plaintiff had made large investments in the State of Iowa in connection with the establishment and op-

eration of some twenty-seven retail stores. That the plaintiff has complied with the statutes of the state relative to the assessment of its property located within the state and the payment of taxes thereon, the collection and accounting for the so-called sales tax under the laws of the State of Iowa, on merchandise sold by it in its various stores in Iowa, and the so-called use tax, save and except in the particular as hereinafter mentioned. That the plaintiff operates a very extensive business in the various states of the United States, and in its business organization or setup, it maintains at certain designated localities units of its business which are confined exclusively to what is known as the mail order business. That it has one such unit located in the City of Chicago, Illinois, one in Kansas City, Missouri, and one in St. Paul, Minnesota, together with certain other units of like kind located elsewhere in the United States but which are not involved in this case before the court.

That periodically during the year plaintiff causes to be printed and issues what may be termed a general catalogue, which it disseminates to prospective purchasers or customers throughout the territory served by these mail order units of its business, and that such catalogues or publications are circulated throughout the State of Iowa. That [fol. 93] customers of the plaintiff in ordering from such catalogues use a form supplied by the plaintiff in which the purchaser designates the specific property which the customer is purchasing, by proper reference to the designation of such article in the catalogue; the purchaser encloses with such order the amount to cover the purchase price, together with the cost of transportation from the mail order unit to which the order is addressed, to the point designated in Iowa by the customer. By specific terms embraced in the order blank, the plaintiff reserves the right of acceptance of the order at the point of reception, that is, either in Chicago, Kansas City, or St. Paul, according to the unit to which the customer may mail his order, and the delivery of the goods to the purchaser is designated to be as and of the point of the location of the mail order unit so receiving said order from said customer. That is, if the order is received at Chicago, Illinois, the point of delivery to the customer is specifically provided to be in Chicago, Illinois, and likewise with respect to the other units at St.

Paul and Kansas City, if the order is transmitted from the customer to such unit through the mail or otherwise.

On orders of this character so received at these mail order units in these several locations, the plaintiff, although demand has been made upon it by the defendants in this action who compose the Iowa State Board of Assessment and Review and who are designated by the so-called use tax act as the body having the enforcement of said use tax law under its authority and control, has refused to collect from the mail order purchaser the said so-called use tax upon the items covered in any of the purchases so made in the manner as indicated herein.

That prior to the commencement of this action, and on or about the 28th day of February, 1938, the defendants [fol. 94] caused to be served upon the plaintiff a notice and order advising the plaintiff that unless it complied with the demands of the defendants to collect upon such mail order items the use tax, and remit the same to the State of Iowa through said Board of Assessment and Review, that the said Board would proceed with the necessary steps under the statutes of Iowa to cause a revocation of the right of the plaintiff to transact business in the State of Iowa and to oust from the State of Iowa the said retail establishments of the plaintiff so theretofore established under the general authority granted to it to transact business in the State of Iowa prior to the adoption of the said use tax law, and that following the serving of said notice and order upon the plaintiff this action was commenced to restrain the defendants from carrying out their threatened action looking toward the cancellation of the right of the plaintiff to transact business in the State of Iowa through the medium of the said retail stores, and to oust them from the transaction of business within the state.

By appropriate allegations in plaintiff's petition, the contemplated action of the defendants with respect to the cancellation of the right of the plaintiff to transact business in Iowa is attacked on numerous constitutional grounds involving alleged violation of constitutional provisions of the Constitution of the United States and also constitutional provisions of the Constitution of the State of Iowa, which it is claimed protects the plaintiff in the situation, and which would be violated if the threatened action of the defendants was carried out to its proposed culmination.

For the purposes of a disposal and a decision of the rights of the parties in this case, the court feels that only certain of these various questions so raised by the plaintiff are necessary to be determined for a solution in this case, and the court will proceed in the subsequent portions [fol. 95] of this opinion to pass upon and decide the rights of the parties in this case, bottomed upon the questions touched upon in this opinion, and those only, as, in the judgment of the court, the final conclusion as arrived at in this opinion disposes of the rights of the parties and is a complete adjudication of the merits of this case.

The plaintiff contends that under the fact situation as it is disclosed by the record in this case, the so-called use tax act, interpreted and applied as is attempted to be done by the defendants in connection with the plaintiff's business, violates Section 8 of Article I of the United States Constitution, the same being what is commonly known and understood to be the interstate commerce clause of the Constitution of the United States, and in this connection the plaintiff points out that under the use tax act it is provided as follows:

Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state, not exempted under the provisions of Section Three hereof nor collectible under the provisions of Section Six hereof, shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the board, if the board shall, by regulation, require such receipt. Each such retailer shall list with the board the name and address of all his agents operating in this state, and the location of any and all his distribution or sales houses or officers or other places of business in this state.

And it is claimed by the plaintiff that this provision of the law which attempts to force the plaintiff to collect the use [fol. 96] tax on these mail order items is an invasion of the powers of Congress under Section 8, Article I of the Constitution of the United States, for that, the effect of the act is to regulate interstate commerce between the states of Illinois, Missouri and Minnesota, and the State of Iowa, as the

case may be in the particular facts surrounding the particular mail order item involved, and that the effect of it is to place an undue burden upon the plaintiff in respect to an interstate commerce item, which the State of Iowa is denied the right to legislate in respect to by said Section 8 of Article I of the Constitution of the United States, all power in respect thereto being reserved to the Congress of the United States.

In the oral argument in the submission of this case to this court, the attorney for the State of Iowa substantially admitted that the contentions of the plaintiff would be true if the so-called use tax act was to be literally construed in strict accord with the language of the act as herein quoted, but claimed that it was incumbent upon this court to construe the said use tax act so as to harmonize the same with the Constitution of the United States in the particular complained of, if the act was susceptible of such construction, and that it was so susceptible to such construction, by construing the act so as not to require the plaintiff to collect the use tax at the time of making such sales in Illinois or Missouri or Minnesota, as the case may be, but contended that it became the duty of the plaintiff-seller to follow the items sold into the State of Iowa and collect the use tax when the interstate commerce feature had ceased to exist by reason of the article coming to rest within the State of Iowa, and that so construed the act would not be violative of the commerce clause of the Federal Constitution.

[fol. 97] The answer to the contentions of the State is,

First. That such interpretation is contrary to the express language of the act, for that it is provided that the seller

shall at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser,

and nowhere in the act is there any other provision for the manner or time of collection, which applies to the plaintiff under the facts in this case. The State contends that the word "shall" should be construed as "may", for that in numerous decisions of our Supreme Court in construing statutes the word "shall" has been construed "may". But, wherever that has occurred, the use of the word "may" in place of the word "shall" does not do violence to the express

language of the act, as is apparently true in the situation as it confronts the court in connection with the act under consideration. In other words, if we are to use the interpretation as suggested by counsel for the State, we would have this law read that the seller

may at the time of making such sales, whether within or without the state, collect the tax imposed by this act from the purchaser, etc.,

and in order to give proper effect to the word "may" as used in the act, under such an interpretation, the court would have to give force and effect to the word "may" as if it read "shall", for otherwise there would be no duty created by the statute upon the seller to collect the tax. If the word "may" is to be used literally, it is merely permissive and not mandatory.

Second. A construction and application similar to what is contended for by the State, would result in not only [fol. 98] leaving the act open to an attack as violative of Section 8 of Article I of the Constitution of the United States, but would leave it susceptible to the attack because of its violation of Section 1 of the 14th Amendment to the Constitution of the United States, as asserted by plaintiff herein. The effect of the construction as contended for by the State would result in a denial to the plaintiff of the right to contract, for instance, in the State of Illinois, with a prospective purchaser from Iowa, in such a way as to bring about a situation whereby the contract would be exclusively an Illinois contract, as actually exists in connection with the transactions as the record shows with respect to each of these mail order items, and to say to the plaintiff,—

"If you sell to some purchaser living in Iowa, although the transaction may have its inception and its consummation in the State of Illinois, still you are required by the laws of Iowa to retain dominion and jurisdiction over the item involved in the transaction and to follow the same into the State of Iowa in an interstate shipment where the seller is an involuntary shipper, and to collect the tax when the interstate feature has ceased to exist and the article has come to rest in the State of Iowa."

A denial of the right to so contract clearly infringes upon the provisions of Section 1 of the 14th Amendment

to the Constitution of the United States, for it is an abridgment of the right that the plaintiff is entitled to exercise in the foreign jurisdiction, so far as the State of Iowa is concerned, of entering into contractual relations whereby the plaintiff sells and a resident of this state buys, with the specific conditions in the contract that the delivery shall be at the point of purchase in the foreign jurisdiction and not at a point in the State of Iowa. To deny a citizen of [fol. 99] another state the right to so contract with a citizen of this state, certainly is to abridge the privilege and immunities of citizens of the United States and to deny the plaintiff the protection of the said 14th Amendment in that particular. It also would have the effect of denying the equal protection of the laws, as prohibited by the said Section 1 of the 14th Amendment of the Constitution of the United States, for the record shows that there are competitors of the plaintiff in these various localities where plaintiff has these mail order units, who have no places of business in Iowa and who are not affected by the use tax law.

As heretofore suggested, such a construction would also violate the interstate commerce clause of the Constitution of the United States, being Section 8 of Article I, in that it would deny to the plaintiff the right of delivery of the purchase in the foreign state as contemplated by the contract entered into between the seller and the purchaser, as shown by the record in this case, and make it obligatory upon the plaintiff to retain dominion over the article of sale until it had reached its destination in Iowa, and thereby compel the plaintiff to become an involuntary shipper in an interstate shipment. If anything of that character is possible under the law, it must be through an act of Congress and not through the act of a legislature of a given state, because the effect of it is to make the plaintiff engage in interstate commerce with respect to that shipment against the will and judgment of the plaintiff and against its desires, simply because it indulges in the privilege and right which it has as a citizen of the United States to engage in a contractual relation with a citizen of the State of Iowa outside the State of Iowa and in a foreign jurisdiction, and although such contract may be in strict conformity to the requirements of the statutes of the state where the contract is made and in conformity to the requirements of the Constitution [fol. 100] and the acts of congress with respect to the United States. And, in addition to what has already been sug-

gested, no such result can be accomplished except by and through an extraterritorial effect to the local statutes of Iowa, and to sustain which there has been no authorities submitted to this court by counsel for the State.

The State does contend that this case comes within the pronouncements of the United States Supreme Court in the cases of Wiloil Corporation v. Pennsylvania, 294 U. S. 169; Henneford, et al., v. Silas Mason Company, Inc., et al., 300 U. S. 577; State of Minnesota v. George Blasius, 290 U. S. 1; Monamotor Oil Company v. Johnson, 292 U. S. 86, and Felt & Tarrant Mfg. Co. v. Corbett, reported in 23 Federal Supplement on page 186, but the court is of the opinion that an analysis of these cases will clearly establish that they are readily distinguishable from the situation that exists in the case at bar. In all of these cases the language of the opinion clearly shows that either the owner of the property involved and upon which the tax was sought to be collected, brought the property into the state and the state authorities were proceeding against such owner to collect the tax, or where the state authorities were proceeding to subject the seller to the payment of the tax, such seller was the shipper of the articles into the state and the articles had come to rest in the various states, and the tax was held to apply after the articles had ceased to be in interstate commerce and had come to rest in the state involved and was still within the dominion and control of the seller at the time of the attaching of the tax feature.

The State of Minnesota v. Blasius, supra, is a case where the property was in the possession and control of the owner in the State of Minnesota and the owner contended that it was still in process of interstate commerce, for that it had only come to rest in Minnesota temporarily, the property [fol. 101] being cattle, but in the case, Mr. Chief Justice Hughes writing the opinion, points out,

that Blasius did not buy the cattle for the purpose of export or shipment to another state; and that after their purchase by him, and until he resold, the cattle were "at absolute and complete rest in the yards at South St. Paul" and "were a part of the general mass of cattle in the state and locally owned."

The quoted language here was quoted by Mr. Justice Hughes from the opinion of the trial court and was adopted by the Supreme Court as the fact.

Henneford v. Silas Mason Company, supra, was another case where the property was in the possession and control of the owner in the State of Washington, and the owner, the plaintiff in the action, being a contractor on the Grand Coulee Dam on the Columbia River, shipped the articles of machinery into the state and they came to rest in the state and had been used for months in the work of the contractor, and again the court held that because they had come to rest in the state, under the control and possession and dominion of the owner, they were amenable to the tax in controversy.

In the Felt & Tarrant Mfg. Co. v. Corbett case, supra, it appears from the language of the opinion as follows:

The plaintiff is an Illinois corporation and it sold comptometers in the State of California by and through the medium of two local agents residing in California; that these agents in selling the articles did so by and through the medium of written contracts which provided that it did not become a contract with the plaintiff until it had been accepted by them at their place of business in Illinois, but the contract contained this provision,

[fol. 102] All orders taken must be submitted to and approved by plaintiff, all sales and deliveries must be made by, and all bills for such orders as are accepted must be rendered by, the plaintiff.

It further appears from the language of the opinion, as follows:

All machines sold for delivery in California are shipped from one of plaintiff's distributing points outside of the state. Sometimes machines are forwarded directly to the purchasers, while in other instances, in order to secure reduced freight charges, large groups of machines are shipped to the general agent who makes delivery to the respective purchasers.

When we consider that under the terms of the written contract all deliveries were required to be made by the plaintiff, and then the further observation of the court is taken into consideration, that in order to reduce freight charges the plaintiff-seller shipped large quantities of machines at one time, it is clearly apparent that in this cited case the shipment of the machines into the State of California was by the plaintiff, and they continued their dominion and con-

trol over the machines until the delivery in California, at which time, under the decisions of the Supreme Court of the United States, the articles had ceased to be in interstate commerce and had come to rest in the State of California.

Defendants in the instant case lay great stress upon the decision of the United States Supreme Court in the case of the Monamotor Oil Company v. Johnson, supra. That case had its origin in the State of Iowa, and it is claimed by the defendants in the instant case to be decisive of the question that we have under consideration here.

[fol. 103] With this conclusion this court cannot agree. It appears from the opinion in the cited case that the appellant was an Arizona corporation engaged in the business of buying, manufacturing, blending and selling gasoline and kindred products, including the importation into Iowa of gasoline by tank cars, and that in some instances the plaintiff shipped direct to dealers in Iowa, customers of the appellant, and it was claimed by the plaintiff that because of these direct shipments, the burden on interstate commerce was obvious. In disposing of the case the Supreme Court of the United States, Mr. Justice Roberts delivering the opinion, says, in connection with this contention of the plaintiff:

The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant.

Now, when we take the language as quoted from this cited case and consider it in the light of the law defining who was a distributor of motor fuel oil within the meaning of the statute, it is plain that this decision in the cited case was predicated upon the fact that the Monamotor Oil Company actually was the shipper of the oil, under all circumstances, into Iowa, and continued to have dominion and control over it until a delivery to the dealer in Iowa, because the law defining who is a distributor is as follows:

any person who brings into the state or who produces, refines, manufactures or compounds within the state any

[fol. 104] motor vehicle fuel to be used within the state or sold or otherwise disposed of by him within the state for use in the state.

So that in order to be a distributor one must either bring the oil into the state or produce it or refine it or manufacture it, or compound it, within the state, for use within the state. So that it is apparent that in the consideration and determination of this cited case, the United States Supreme Court understood, and the records show, that on these shipments direct to dealers in Iowa, the Monamotor Oil Company was the shipper and continued in dominion and control of the products so shipped until they came to rest in Iowa and were delivered to the dealers. Under such circumstances, of course, under the decisions of the United States Supreme Court, as herein cited, the oil having come to rest before delivery to the dealer, the distributor was liable in the first instance for the tax.

This distinction which is pointed out in connection with all of these cases upon which the State relies, is clearly set forth in the opinion of the Supreme Court of the United States in the case of Wiloil Corporation v. Pennsylvania, supra. The opinion in that case was written by Mr. Justice Butler, and in order to have the fact situation clearly before us it is advisable to set out the statement of the facts as found by the court:

Appellant, a Pennsylvania corporation having its principal place of business in Pittsburgh, sells liquid fuels at wholesale and is a distributor as defined by the act. The tax in controversy was laid at three cents per gallon upon the contents of 13 tank cars sold and delivered by it. All were ordered through its agent in Philadelphia for delivery [fol. 105] to purchasers at that city or at Essington, Pennsylvania. The orders specified a price per gallon "f. o. b. Wilmington, Del., plus 3c tax," and were subject to, and received, appellant's approval at its office in Pittsburgh. The purchasers were not licensed or taxable as distributors. All fuels delivered under these contracts were obtained from Crane Hook Company of Wilmington, Delaware, and on the order of appellant were shipped by rail from there to the purchasers in Philadelphia or Essington. Each car moved on a bill of lading in which the appellant was consignor and the purchaser was consignee; the place of shipment indicated was Wilmington and the place of destination was

consignee's private siding in Philadelphia or Essington. Appellant prepared and sent to the buyer an invoice covering each shipment showing the price as stated in the order.

The inference that might be drawn from the f. o. b. order, the billing and straight bill of lading that the parties intended delivery to purchaser at place of shipment is negatived by other circumstances. The contracts were executory and related to unascertained goods. It does not appear that when they were made appellant had any fuels of the kinds covered or that those to be delivered were then in existence. There was no selection of goods by purchasers. Appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania. It is the practice in appellant's business to sell f. o. b. at a specified place in order to fix the price and such billing may be merely price fixing and not an indication of the source or place of shipment. The reference to the tax in the orders and invoices would have been unnecessary if delivery were [fol. 106] not to be made in Pennsylvania for if made at Wilmington, the transactions would not have been within the provision of the taxing act.

The great particularity with which Mr. Justice Butler points out the retaining of the control and dominion over the shipment by the Wiloil Corporation in this cited case, will be noted, and his plainly pointing out that the tax reference in the orders would have been unnecessary,

if delivery were not to be made in Pennsylvania for if made at Wilmington, the transactions would not have been within the provision of the taxing act.

clearly shows that this matter of dominion and control over shipments of this character is the paramount and outstanding consideration in determining whether or not the seller of an article is to be held liable in the first instance for a tax of the character we have under consideration in the instant case, and all of the cases upon which counsel for the State of Iowa in the case at bar relies as sustaining his contention of the right of the State to insist upon the collection of the tax in this case under consideration, by the seller, are clearly distinguishable from the fact setup that we have to deal with in the instant case.

As indicated by the reasoning of the court in the instant

case and in this opinion, this court is of the opinion, and so holds, that the attempt by the State of Iowa, through the medium of the defendants, the Board of Assessment and Review of the state, to interpret and apply the statute so as to make it obligatory upon the plaintiff to collect the use tax on these items of exclusive mail order transactions wherein the fact situation is as already outlined herein, is clearly violative of the constitutional rights of the plaintiff in regard to invading the rights of the plaintiff under Sec-
[fol. 107] tion 1 of the 14th Amendment to the Constitution of the United States, and in regard to Section 8 of Article I, of said Constitution.

The defendants further contend that even though the court finds as it has already found and expressed herein, that the statute as interpreted and applied by the defendants is violative of the constitutional rights of the plaintiff under the Federal Constitution, that still it is within the legal right of the State to predicate an order cancelling the permit of the plaintiff to transact business in the State of Iowa, upon its refusal to comply with the notice and order as served upon it by the defendants to proceed to collect and report to the defendants for the use tax upon these items of mail order business, and in support of their claims in this regard this court is cited to several cases, one of the outstanding ones being Security Mutual Life Insurance Company v. Prewitt, 202 U. S. 246. Counsel for the State in oral argument laid emphasis upon this case and several others of a like tenor, but possibly in none of the cases cited is the language quite as positive and extreme as is the language of Justice Peckham in the cited case referred to, and if the cited case was still the law there would be much of merit in the contention of the State on this proposition, but fortunately the United States Supreme Court in the case of Terral v. Burke Construction Co., 257 U. S. 529, has clarified a doubtful situation which had existed over a period of years in connection with this question now under consideration.

It appears from a reading of the opinion that the Burke Construction Company was a corporation organized under the laws of the State of Missouri; that it had been licensed to do business in the State of Arkansas; that it was organized for the purpose of doing construction work and was actually so engaged in Arkansas; that the right to do busi-
[fol. 108] ness in the state was a valuable privilege, and the

revocation of the license would greatly injure it. That it had brought an original suit in the federal court of Arkansas and had removed a suit brought against it to the same federal court; that the Secretary of State was about to revoke the license because of said suit and such removal, acting under the requirement of Section 1 of the Act of the Legislature of Arkansas of May 13, 1907, reading as follows:

If any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the Secretary of State to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in this State; and if such corporation shall thereafter continue to do business in this State, it shall be subject to the penalty of this Act for each day it shall continue to do business in this State after such revocation.

The penalty was fixed at not less than $1,000.00 a day. The plaintiff construction company averred that the Act was in contravention of Section 2, Article III, being the judiciary article of the Federal Constitution, and of Section 1 of the 14th Amendment. The defendant filed an answer in the case containing some denials, but there was no denial that the plaintiff was a foreign corporation or that it had been duly granted a license to do business in the State of Arkansas, or that its right to do such business in Arkansas was a valuable right, or that it had commenced an action in federal [fol. 109] court and removed another one, or that the defendant intended to cancel the plaintiff's license because of the removal of the case to the federal court and the commencement of the other one therein. Such matters not being denied were accepted as admitted, and then Chief Justice Taft says:

The sole question presented on the record is whether a state law is unconstitutional which revokes a license to a foreign corporation to do business within the State because, while doing only a domestic business in the State, it resorts to the federal court sitting in the State.

The cases in this court in which the conflict between the

power of a State to exclude a foreign corporation from doing business within its borders, and the federal constitutional right of such foreign corporation to resort to the federal courts has been considered, can not be reconciled. They began with—

And then Chief Justice Taft cites a number of cases involving the question, including Barron v. Burnside, 121 U. S. 186, which went up to the Supreme Court of the United States from the State of Iowa, and in which the Supreme Court had held a statute of the same character as was under consideration in the Terral case from Arkansas, to be unconstitutional, and also this case already referred to, Security Mutual Life Insurance Co. v. Prewitt, 202 U. S. 246, and then he says:

The principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of [fol. 110] its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law. It follows that the cases of Doyle v. Continental Insurance Co., 94 U. S. 535, and Security Mutual Life Insurance Co. v. Prewitt, 202 U. S. 246, must be considered as overruled and that the views of the minority judges in those cases have become the law of this court. The appellant in proposing to comply with the statute in question and revoke the license was about to violate the constitutional right of the appellee. In enjoining him the District Court was right, and its decree is Affirmed.

This pronouncement of the Supreme Court through the opinion of the late Mr. Chief Justice Taft, is still the law

of this country so far as this court has been able to ascertain from an examination of the authorities, and it has been applied on a number of occasions since its pronouncement, one such application being by the late Mr. Justice Holmes in the case of Fidelity & Deposit Co. v. Tafoya, [fol. 111] 270 U. S. 426, wherein Mr. Justice Holmes uses the following language:

Coming then to the merits, we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result.

And further on in the opinion Mr. Justice Holmes refers specifically to the Terral v. Burke Construction Co., case, supra, citing it with approval. How apt in its application to the case at bar is this quotation from this opinion in the cited case under consideration:

One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result.

In the case at bar the State of Iowa, through the instrumentality of the defendants, is seeking to oust the plaintiff company from the right to do business in the State of Iowa because it refuses to perform an act demanded of it which is violative of its constitutional rights under the provisions of the Federal Constitution as already herein discussed, and saying to the plaintiff,—"Unless you do comply with our illegal demand you will have to get out of the State of Iowa with your retail stores." If that can be accomplished through the medium of legislative enactment of a state and thereby nullify the constitutional inhibitions of the Federal Constitution, there is nothing left of the Federal Constitu- [fol. 112] tion*al* which would make it rise to the dignity of the fundamental law of this country, which it is and which it has been recognized to be for all the years since it has been adopted.

So that the court is satisfied that there is no merit in the

contention of the State that is can predicate an order of removal against the plaintiff company and compel it to remove from the State of Iowa with its retail stores because of the failure of the plaintiff to acquiesce in the demands of the state through the medium of the defendant Board, in regard to the collection of and accounting to the State for the use tax on these items involved in the exclusive mail order business of the plaintiff, as described in this opinion.

What has been said in regard to the inability of the State to predicate an order of removal against the plaintiff because of the invalid demand in regard to the tax on these mail order items applies with equal force to the suggestion of the State that because the State of Iowa has reserved by Section 8376 of the Code of 1935, the right and power to legislate as to corporations and to enact laws different from those obtaining at the time of the organization of the corporation, that is has the right to enact mandatory laws of the character involved in this action and to expel a foreign corporation who refuses to comply. The particular section referred to is as follows:

The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of either title 19, 20, 21, or 22 or whose organization may be adopted or amended thereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used, or enjoyed by such corporation may be regu- [fol. 113] lated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good.

It must be apparent that this reserved power can only be exercised by and through the medium of legal legislative enactment. Unless the act has been legally enacted and is legal in its effect on the thing legislated with reference to, it is not a law, and never rises to the dignity of a law, and therefore can be of no effect. And it would be astounding if the pronouncement of the legislature as to what was for the public good would be sustained, notwithstanding the fact that the particular act was found to be violative of the inhibitions of the Constitution of the United States. That is clearly contradictory in its terms. An act that would violate the Constitution of the United States necessarily could never be for the public good.

The same is true of the suggestion by counsel for the State, that in the issuance of the permit to the plaintiff company, there was incorporated the reserved power to proceed with subsequent legislative control similar to what is covered by the section of the Code above quoted. As has been seen in Terral v. Burke Construction Co., supra, even if the plaintiff company in this case before the court, had signed an express waiver and entered the state with that situation and proceeded to transact business, the waiver is held a nullity, and it may resort to the federal courts or to any court in this country for protection against the invasion of its constitutional rights, and it is without liability to be removed from the state on peremptory order because of its invoking the aid of the court to so protect it.

The court has sufficiently outlined herein by its reasoning, that in this case the plaintiff is entitled to the issuance [fol. 114] of an injunction permanently enjoining the defendants from doing or performing any or each of the things specified in plaintiff's prayer, insofar as any such act or thing may be predicated upon the failure of the plaintiff to comply with the demands of the defendant Board in connection with the collection of the use tax on items of merchandise sold by and through the medium of the exclusive mail order business of the plaintiff, and in the manner as herein outlined, as the same may occur in any of its exclusive mail order depots or houses located outside of the State of Iowa.

Counsel for plaintiff is directed to prepare a decree in conformity to this opinion, submit the draft of the same to counsel for the State for approval as to form, noting an exception to the State of the defendants on all adverse rulings, and when so approved as to form, submit the same to this court for signing and entering of record in the case.

(Signed) John J. Halloran, Judge.

JUDGMENT AND DECREE

This cause having heretofore come on for hearing on the 13th day of October, 1938, the plaintiff appearing by its attorneys, Stuart S. Ball, Robert L. Wright and Parrish, Guthrie, Colflesh & O'Brien, and the defendants appearing by their attorneys, John H. Mitchell, Attorney-General for the State of Iowa, Charles Bookin, Special Attorney General for the State of Iowa, and Charles W. Wilson, Assist-

ant Attorney General for the State of Iowa. The court having heard the evidence and arguments of counsel and having taken the same under advisement, and on the 21st day of December, 1938, filed an opinion of the court, finds [fol. 115] that on the facts and laws and for the reasons as stated in said opinion, the merits of said cause are with the plaintiff, and the plaintiff is entitled to the relief prayed for in its petition.

Now, Therefore, in conformity with said opinion,

It Is Hereby Ordered, Adjudged and Decreed:

(1) That the temporary injunction heretofore granted to the plaintiff in this cause shall be made permanent.

(2) That the defendants and each of them, and their successors in office, are permanently enjoined and restrained from doing any and each of the following acts, to-wit:

(a) Making any finding of fact that this plaintiff has failed to comply with the requirements of the order of the Board dated February 26, 1938;

(b) Making any finding that plaintiff has failed to comply with the provisions of the Iowa Use Tax Laws;

(c) Revoking or cancelling any sales permit issued to plaintiff covering the operation of its retail establishments in the State of Iowa;

(d) Sending any copy of any order of the said Board with respect to plaintiff's failure to comply with the Iowa Use Tax Law to the Secretary of State of the State of Iowa;

(e) Making any request upon the Secretary of State of the State of Iowa for the revocation of the permit of this plaintiff to do business within the State of Iowa;

(f) From taking any action or issuing any order under or in accordance with the resolution and order of the re- [fol. 116] spondent, Exhibit "A" attached to plaintiff's petition, and dated February 26, 1938;

(g) From taking any action that will in any way disturb the position of this plaintiff with respect to its business in the State of Iowa as a result of any failure on the part of plaintiff to comply with any provisions of the Iowa Use Tax Law;

insofar as such acts may be predicated upon the failure of plaintiff heretofore or hereafter to comply with the

demands of the defendants, or their successors in office, for the collection by the plaintiff, and/or the payment or remittance by the plaintiff of the "Use Tax" on items of merchandise sold by and through the medium of the exclusive mail order business of the plaintiff.

(3) Judgment is hereby rendered in favor of the plaintiff and against the defendants, and each of them, for the costs of this action as taxed by the Clerk.

(4) The injunction bond filed by plaintiff in connection with the issuance of the temporary injunction is hereby released and the surety exonerated.

The defendants duly except to all adverse ruling and to this decree.

Dated this — day of December, 1938.

—— ——, Judge.

Thereafter the defendants perfected an appeal from the foregoing judgment and decree by serving on the plaintiff's attorneys on the 28th day of March, 1939, and by filing in the office of the Clerk of the District Court of Polk County, Iowa, on the 29th day of March, 1939, with acceptances of service endorsed thereon a

[fol. 117] NOTICE OF APPEAL

To: Montgomery Ward & Co., Incorporated, plaintiff and to Parrish, Guthrie, Colflesh & O'Brien, Robert L. Wright and Stuart S. Ball, their Attorneys:

You and each of you are hereby notified that the defendants herein have appealed to the Supreme Court of Iowa, from the final judgment in this cause and from the final order or decree herein and from each and every ruling adverse to the defendants during the progress and hearing of the said case and that said appeal will come on for hearing at the May, 1939 term of the Supreme Court of Iowa or as soon thereafter as the same can be heard in its regular order in said court.

Dated at Des Moines, Iowa, this 27th day of March, 1939.

CERTIFICATE RE STATEMENT OF EVIDENCE

On the 14th day of October, A. D., 1938, there was filed in the office of the Clerk of the District Court of Polk County, Iowa, the official shorthand notes taken by the re-

porter in said case, containing all of the evidence offered, introduced, heard, read or received in the trial of said cause, and all objections thereto, and all rulings of the court thereon, and exceptions taken to said rulings, together with exhibits offered and introduced on the trial and made a part of the record therein, said shorthand notes, together with the exhibits and documentary evidence, being certified to by Honorable John J. Hallaran, Judge, and Vernon L. Grant and W. Scott Reiniger, official shorthand reporters.

On the 30th day of June, A. D., 1939, there was also filed in the office of the Clerk of the District Court of Polk County, Iowa, a transcript and translation of said short-
[fol. 118-120] hand notes, certified to by the shorthand re-reporters transcribing said notes as an accurate transcription of the shorthand notes of the evidence taken in the trial of said cause by the shorthand reporters.

CERTIFICATE OF ATTORNEYS

We hereby certify that the foregoing Abstract is a full and complete abstract of the record in the foregoing cause, including abstract of all pleadings filed in said cause, together with the rulings of said court with the objections and exceptions thereto in so far as the same are material to this appeal.

Fred D. Everett, Attorney General, John E. Mulroney, Assistant Attorney General, Attorneys for Appellants.

NOTICE OF ORAL ARGUMENT

Notice is hereby given that upon the submission of this cause, the appellants will appear and argue the same orally.

Fred D. Everett, Attorney General, John E. Mulroney, Assistant Attorney General, Attorneys for Appellants.

CERTIFICATE OF COST

We hereby certify that the cost of printing the foregoing Appellants' Abstract of Record is in the sum of $102.75.

Fred D. Everett, Attorney General, John E. Mulroney, Assistant Attorney General, Attorneys for Appellants.

[fol. 121-122] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 123] In Supreme Court of Iowa, September Term, 1939

Equity. 9-44963

Montgomery Ward & Co., Incorporated, Appellee,

vs.

Louis E. Roddewig, D. L. Murrow, and C. F. Green, Individually and as Members of the Iowa State Board of Assessment and Review, Appellants

Appeal from District Court of Polk County, Iowa, Honorable John J. Halloran, Judge

Appellee's Denial of and Amendment to Appellants' Abstract of the Record and Notice of Oral Argument—Filed August 10, 1939

[fol. 124] The appellee, Montgomery Ward & Co., Incorporated, denies that Appellants' Abstract of the Record, filed herein, is a full, true and complete Abstract of the Record, and states that the same is incorrect and incomplete and does not fairly and correctly show the record as made, and appellee therefore amends said Abstract of the Record by adding thereto or striking therefrom, as follows, to-wit:

Plaintiff's Evidence

G. W. Vaught, called and sworn, testified on behalf of the plaintiff, as follows:

Direct examination:

On page 34, strike the period in line 27 and substitute a comma therefor, and add after the comma the following:

"such as billing, sales abstracts, entry index and other similar offices." (Tr. p. 4.)

On page 34, after the word "controller," appearing in line 27, add the following:

"that is, controller of stocks, from both the dollar standpoint and that of items and units. It had to do with the units of merchandise handled or the dollar value of them." (Trans. p. 4.)

On page 34, after the period in line 30, add the following:

"The bargain book is the small catalog issued about six times per year, averaging from 32 to 100 pages, primarily for the disposal of surplus or discontinued stock." (Trans. p. 5.)

[fol. 125] On page 34, after the period in line 34, add the following:

"As treasurer, there are under my general supervision, the finance and credit offices, the accounting and statistical and auditing department, the secretary's office which has to do with the law, insurance, taxes and stock transfers." (Trans. p. 5.)

On page 35, between the words "show" and "the", in line 1, insert the following:

"the amounts owed to the company by customers and" (Trans. pp. 5-6).

On page 35, after the second comma, appearing in line 13, add the following:

"the next classification is" (Trans. p. 7).

On page 55, after the word "and," in line 15, add the following:

"the third classification is" (Trans. p. 7).

On page 35, after the period, in line 22, add the following:

"The company has shipped merchandise to Iowa customers by mail since 1872." (Trans. p. 9.)

On page 36, after the word "items," in line 14, add the following:

"or 15,000 to 18,000 stock keeping units" (Trans. p. 13).

On page 36, after the period, in line 26, add the following:

[fol. 126] "These orders contain a description of the merchandise." (Trans. p. 15.)

On page 37, after the period in line 3, add the following:

"The general method of handling mail order business, especially the method of keeping records, is the same in all our

mail order houses. There have been no material changes in this procedure during all the time I have been with the company." (Trans. p. 18.)

On page 38, strike the first comma appearing in line 17, and substitute therefor a semi-colon. (Trans. p. 22.)

On page 38, after the period appearing in line 25, add the following:

"The catalog from St. Paul instructs that the order be sent to St. Paul, catalogs from Kansas City that it be sent to Kansas City, etc." (Trans. p. 23.)

On page 40, strike lines 14 to and including the period in line 18, and substitute therefor the following:

"The spring and summer 1938 catalog was distributed to Iowa customers from the three mail order houses during January and early part of February, and the general catalogs for the fall and winter 1937-1938 were distributed from the three houses to the various Iowa customers during July and the early part of August. (Trans. p. 25.) It is a fact that orders sent in by customers very generally followed the instructions, using our blanks and filling them in as they are designed." (Trans. p. 26.)

[fol. 127] On page 41, after the period in line 21, add the following:

"The service is similar." (Trans. p. 29.)

On page 41, immediately before the word "desk," in line 24, add the following:

"mail order" (Trans. p. 20).

On page 41, strike from line 25 the words "and he", and all of line 26 and to the period in line 27, and substitute therefor the following:

"and they remit for the shipment at the time they remit for the merchandise. There are cases where the customer need not remit for the merchandise at that time, that is where the shipment is to be made C. O. D. or where (Trans. p. 30) the customer is to be billed for the cost of carriage, and other cases where the company extends credit to the customer.' " (Trans. p. 31.)

On page 41, after the word "customer", appearing in line 33, add the following:

"and the order is held until the report is received before it is either accepted or rejected," (Trans. p. 31).

On page 43, after the word "machine," appearing in line 5, add the following:

"that part is used for addressing labels for the order and for any future shipments to that customer" (Trans. p. 35).

On page 43, strike the word "card" in line 7, and substitute therefor the word "record." (Trans. p. 36.)

[fol. 128] On page 43, strike the two sentences following the period in line 7, and ending with the period in line 15, and substitute therefor the following:

"A customer's order, all of the original papers, and all copies made for use of the various merchandise divisions, are returned to the customer with the package of merchandise. No copy whatever is kept of these order blanks or other papers relating to the order for cash orders. The amount of sales to a particular customer is not necessarily the same as the amount which is recorded on the customer's stencil card. The factors that make for the variation are omissions, changes in price, substitutions, credit rejections. The index card is prepared and filled out prior to the time the order is priced. (Trans. p. 36.) The index card is the first activity after the remittance has been separated from the order. Omissions are cases where we do not have the merchandise or where the customer's specifications did not enable us to select the merchandise and we omit the order. These omissions amount to between 5 and 8 per cent (Trans. p. 37). There is no notation of credit rejections made on the index card. The rejection is after the order has passed the index. The amounts remitted by the customer vary from the actual amount of the order. These variations are caused by errors in calculating transportation costs, errors made by the customer in footing the bill, changes in the price of merchandise since the catalog was issued, or omissions or substitutions. These errors are not corrected prior to the time the order passes through the index department. These errors are caught, if anywhere, in the billing department after the order has been assembled and we are able to determine what part of it is

[fol. 129] being shipped and what part is not. (Trans. p. 38.) The fact as to omissions would be known in the merchandising division where the stock was carried and the orders filled. The customer's order which is in the forward files from which the billing is done from the entry sheet, would not show that record until after the order was assembled and ready to go to the carrier. It is the practice, in the event the customer remits more than his order, to refund it to him. If the customer has not remitted the amount of the order, he is sent a due bill or dun for the short remittance. We almost entirely fill an order if the remittance is less than the amount of the order, and we make no attempt to collect the deficiency on that order prior to the time it is shipped. The billing is sent to the customer afterwards.

Q. Basing your answer on your experience in the mail order business, why is it that practice is followed? (Trans. p. 39.)

Mr. Bookin: Objected to as calling for an opinion and conclusion of the witness, incompetent, irrelevant and immaterial to any issue in this case, no proper foundation having been laid, the witness not qualified.

A. Two reasons. First, the delay of waiting to complete the remittance would probably inconvenience the customer and he would be unsatisfied with the service; and the other reason is in the main the collections for the short remittance is made.

Q. What is the fact as to whether or not you send the shipment in the event the customer is short one or two or three cents in the amount of its order?

A. We don't bill for less than five cents.

Q. Basing your answer upon all of the facts which you have stated concerning the difference between the amount [fol. 130] of the order and the amount of the actual value of the merchandise, price of the merchandise sent the customer, what is the fact as to whether or not the index records actually give you a sales figure for the various customers indicated on the index card? (Trans. p. 40.)

Mr. Bookin: Objected to as incompetent, irrelevant and immaterial to any issue in the case, it is calling for an opinion and conclusion of the witness, and a determination

of an ultimate fact within the jurisdiction and province of the court.

A. The index card, the record does not show a record of sales. (Trans. p. 41.)

On page 43, after the period in line 24, add the following:

"The final record would be in the billing department after the order is abstracted." (Trans. p. 42.)

On page 43, after the period in line 28, add the following:

"The maintenance of such records would require additional handling of the orders in the mail order opening department. (Trans. p. 42.) We would have to segregate the orders from the State and put them in—flag them in some manner to call attention to the billing department, put a colored folder on them or colored flag. There would also be additional handling of the orders required in the time payment installment unit or in the credit department. It would require segregation of the billing of the customers from the State that is not now done. The billing is now [fol. 131] handled in the central time payment department. Considerable quantities of merchandise sold to customers are returned for credit. The adjustment department handles these returns. In order to establish a record of sales to Iowa customers in the operation of the adjustment department, it would be necessary to keep the record of returned (Trans. p. 43) goods in order to deduct that from the previously reported sale, necessary to keep separate records for the State of Iowa for sales allowances and adjustments of price which resulted from complaints. That would affect the sales total in the State. In the accounting and statistical department, additional records would have to be established in order to maintain a record of sales in the State of Iowa and the making of the tax return. And in the supply department, there would have to be added additional forms for handling of the records and for flagging of the orders to call the attention of the billers. Printing, stocking and supplying the additional forms." (Trans. p. 44.)

On page 43, before the period appearing in line 33, insert the following:

"in each of the departments mentioned." (Trans. p. 45.)

On page 44, at the top of the page before line 1, insert the following:

"I have had duties which required me to investigate or devise mail order procedure. When I was in the operating department, I wrote all of the operating procedure for a period of years and I now approve all procedures before they are issued. In the answers which I have given to the [fol. 132] various questions concerning the operations of the mail order houses, that experience has entered into my answers." (Trans. p. 46.)

On page 44, after the period in line 10, add the following:

Q. In the course of your experience in the mail order business, have you observed whether or not the length of time required to fill the order have any affect and re- (Trans. p. 48) sult in the number of complaints made by customers?

Mr. Bookin: Objected to as calling for an opinion and conclusion of the witness, the witness not properly qualified, incompetent, irrelevant and immaterial.

A. There is a direct relation, measurable relation between the time required to fill an order and the dissatisfaction of the customer evidenced by his complaint.

Q. And have you at any time brought any study personally on the reason for that connection?

A. Yes, often.

Q. What are the reasons why that is true?

Mr. Bookin: Objected to as calling for an opinion and conclusion of the witness, hearsay, and incompetent, irrelevant and immaterial to any of the issues in this case.

A. Dissatisfaction of the customer with the delay." (Trans. p. 49.)

On page 46, after the word "Spiegel," in line 21, add the following:

"Incorporated, the Spiegel, May, Stern Company." (Trans. p. 56).

[fol. 133] On page 46, after the period appearing in line 28, add the following:

"I have had to do personally with the turning over of these remittances to the other mail order houses (Trans. p. 57)

and these remittances that I have turned over to other mail order houses have been from some of our customers.

Q. And have any of those remittances been ordered from your (Trans. p. 57) customers?

Mr. Bookin: Same objection as heretofore urged to the last question. (Which was incompetent, irrelevant and immaterial to any issue in this case, calling for the opinion and conclusion of the witness, hearsay.)

A. Yes, sir.

Q. Have you ever observed from your customers' correspondence addressed to Spiegel, May, Stearn Company delivered to Montgomery Ward Company?

Mr. Bookin: Same objection as last urged.

A. Yes.

Q. And the same question with regard to the Chicago Mail Order Company and Bellas-Hess?

Mr. Bookin: Same objection as last made.

A. Same answer.

Q. In connection with your duties as treasurer and the supervision which you exercise over the accounts receivable of the corporation, have you caused credit reports to be made of Iowa customers who have applied for credit with Montgomery Ward & Company of the mail order houses of Montgomery Ward & Company?

Mr. Bookin: Same objection as last urged.

A. Yes.

Q. And have you ascertained from such correspondence [fol. 134] with (Trans. p. 58) such customers whether or not they have accounts with any of the other companies named?

Mr. Bookin: Same objection as last urged.

A. Yes.

The catalogs of Sears, Roebuck & Company, Chicago Mail Order Company, Spiegel and National Bellas-Hess are very competitive to the merchandise displayed in the catalogs distributed by Montgomery Ward & Company. The description and price of the merchandise that we buy, and of the other catalogs, compare with our own. I am familiar with the fact that our company does actually receive orders from Iowa customers at Chicago, Illinois, Kansas City and

St. Paul, and that is a considerable volume of business. (Trans. p. 59.) I know that the other mail order companies do business with our Iowa customers. The number of such instances I have observed would run into many thousands." (Trans. p. 60.)

On page 47, after the period in line 2, insert the following:

"My information is based on the attempts we have made to print separate catalogs for different sections of the country having different climatic conditions. (Trans. p. 63.) I have made a study of the costs of the various parts of the catalog over a period of twenty years as a part of my duty with Montgomery Ward & Company, as a part of the expense control." (Trans. p. 64.)

On page 47, after the period in line 15, add the following:

[fol. 135] "I have had occasion to make specific studies to this effect." (Trans. p. 65.)

On page 47, strike the word "some" appearing in line 29. (Trans. p. 67.)

On page 47, after the period in line 33, add the following:

"These stores make sales to Iowa customers." (Trans. p. 67.)

On page 48, after the period in line 2, add the following:

"Q. Basing your answer upon your experience in the operation of a retail business and merchandise business generally, would it be possible to tell when a customer came into one of those border stores you have named whether or not that customer was a resident of the State of Iowa or intended to use the merchandise for use in the State of Iowa?

Mr. Bookin: Objected to for the reasons urged in the previous objection (calling for an opinion and conclusion, hearsay, not the best evidence, immaterial to any issue in this case).

A. I know of no way that you could determine that." (Trans. p. 69.)

On page 48, strike the period after the word "area" in line 4, and add the following:

"in competition with Montgomery Ward & Company." (Trans. p. 69.)

On page 49, after the period in line 32, add the following:

[fol. 136] "The schedule of orders is done after the index. It would not be possible to do the indexing of orders at a later stage without delaying the order. That has been attempted within the last year at one of the mail order houses. It was found to be too inaccurate and prohibitively expensive. (Trans. p. 73.) The index has been described as a card containing a stencil card, the stencil card is used to make labels with the customer's name and address cut by a stencil cutting machine. That can be placed on the label, a roller with ink rolled over it and the name and address is thereby put on the label or the labels as are required. The index for each one of the houses occupies a very large space. If the record of sales or cards were kept in one part and the stencils kept in another part of the building, it would not be possible to keep both sets of records without increase in the amount of space required. That could not be done without duplication of entry expense. Orders from Iowa customers to Chicago, Kansas City and St. Paul could not be billed from merchandise already on hand kept by the company in the State of Iowa. (Trans. p. 74.) Practically all of the customers sending in their Iowa orders follow the form and the various guides set forth in the catalogs and order blanks. The catalogs are all printed in Chicago."

On page 49, immediately following the first word "the" in line 33, insert the following:

"three" (Trans. p. 75).

On page 50, after the period in line 2, add the following:

[fol. 137] "There is no maximum in the way of physical layout nor any place to put employees nor place to store the merchandise where that could be done by the employes within the State of Iowa." (Trans. p. 75.)

On page 50, strike the period in line 4, and add the following:

"through solicitation of these customers." (Trans. p. 76.)

On page 50, after the period in line 15, add the following: (Trans. p. 75.)

"I have observed correspondence of customers comparing the merchandise through Montgomery Ward & Company

catalogs and that purchased from local merchants. That is true of customers from Iowa. (Trans. p. 78.)

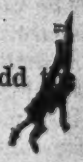
Q. What has been your observation as to whether or not such comparisons indicated that there was competitive relationship between the mail order business and the business conducted by local retailers in the State of Iowa?

Mr. Bookin: Objected to as calling for an opinion and conclusion of the witness, not the best evidence, incompetent, irrelevant and immaterial to any issue in this case, hearsay.

A. Most of the correspondence has to do with the competitive feature, that of price." (Trans. p. 78.)

Cross-examination:

On page 51, after the word "made" in line 9, add the following:



"at the indexing department" (Trans. p. 81).

[fol. 138] On page 51, after the word "but", in line 13, add the following:

"that was terminated when the Illinois corporation qualified to do business in Iowa." (Trans. p. 83.)

On page 51, strike the word "store" appearing at the end of line 15, and substitute therefor the following:

"retail stores in Iowa" (Trans. p. 84).

On page 51, strike from lines 25 and 26, the words "used to convey information to the customer," and substitute therefor the following:

"the tip-ons are only used to convey information to the customer," (Trans. p. 85).

On page 52, after the word "stencil" in line 19, add the following:

"and on the index card we keep the amount of the order" (Trans. p. 87).

On page 52, strike the words "total business" appearing in line 21, and substitute therefor the following:

"mail order business" (Trans. p. 88).

On page 52, strike the period in line 24, following the word "approximated," and add, after said word, the following:

", not established with anywhere near definiteness. (Trans. p. 88.) I don't believe that by making certain allowances, you could establish it within a degree or fraction of a percentage. The percentage of increase of complaints as compared with service can be definitely established to within a fraction or a degree. The statistical department, in this [fol. 139] other matter is unable to operate as efficiently from these records because they do not provide the information in as accurate a form. These records are only of orders. The sale can vary considerably from the order. Part of the instructions to guide the customer are contained in the order blank, Exhibit 'H', and there is another page in the catalog which gives suggestions and helps for filling out the order." (Trans. p. 89.)

On page 53, strike from lines 25, 26 and 27 the words:

"for the expense connected with the employment and wages of the person in the catalog station," and substitute therefor the following:

"on sales alone, based on these orders." (Trans. p. 96.)

On page 53, strike from line 29, the words: "whatever order is received or sent in", and substitute therefor the following:

"sales made as a result of the order" (Trans. p. 97.)

On page 53, after the period in line 31, add the following:

"His salary is based on the volume of sales; his bonus is on the net profits of the store. (Trans. p. 97.) There is no special incentive offered the manager to obtain as many mail order sales as he possibly can other than the income he would derive from his bonus from commissions." (Trans. p. 98.)

On page 53, after the period in line 33, add the following:

"It was not the purpose of our retail stores to act as a leader and an enlarger for our mail order business." (Trans. p. 98.)

[fol. 140] On page 54, before line 1 on said page, insert the following:

"Once we obtain a mail order customer through the store, thereafter we seek by means of catalog activities to acquire as much of that customer's business by direct mail as possible." (Trans. p. 98.)

On page 54, after the period at the end of line 18, add the following:

"The collections of Illinois sales tax takes additional time which entails additional labor and cost. Special records are kept in the accounting department for the Illinois sales tax." (Trans. pp. 100, 101.)

On page 54, strike from lines 25 and 26, the following:

"and practically everything I testified to was some report somebody had handed to me,"

and substitute therefor the following:

"I do not agree with the statement that most of the stuff I testified to was that of which I had no personal information." (Trans. pp. 102, 103.)

On page 55, following the word "that," in line 2, add the word "approximately". (Trans. p. 104.)

On page 55, strike the period in line 12, and add the following:

"We do not have a record of our Iowa sales." (Trans. p. 105.)

On page 55, between the words "the" and "tax" appearing in line 13, insert the word "sales". (Trans. p. 105.)

On page 55, following the period in line 22, add the following:

[fol. 141] "We make no comparison of prices in our catalogs with prices in our retail stores." (Trans. p. 107.)

On page 55, immediately following the comma in line 26, insert the following:

"the difference in price is pretty near accounted for by the difference in transportation cost, the customer paying

in one case and the corporation in the other," (Trans. p. 107.)

On page 55, strike the word "of" at the beginning of line 33, and substitute therefor the word "or". (Trans. p. 109.)

Redirect examination:

On page 56, strike the words "process of filling the mail orders" appearing in lines 11 and 12, and substitute therefor the following:

"total time in handling the order beyond the actual time taken to perform the activities themselves. (Trans. p. 110.) This is because of line time, in order to keep a clerk occupied you have to keep before her a certain bank of work so that she will not run out of work and sit idle, so your line of time before each activity is greater than the time required to perform the service of the order. So if we assume each state serviced by the Chicago house has a sales or use tax and the company is required to collect such taxes, it would not be possible to collect these taxes and do the work with the number of billers which are now used to fill orders received by the Chicago house." (Trans. p. 111.)

[fol. 142] J. H. Schneider, called and sworn, testified on behalf of the plaintiff, as follows:

Direct examination:

On page 57, after the period in line 18, add the following:

"Montgomery Ward & Company sells personal property from its Chicago mail order house to residents of Illinois. Illinois has a tax measured by retail sales." (Trans. p. 117.)

On page 57, strike from line 20 the word "from" and substitute therefor the word "of". (Trans. p. 118.)

On page 58, after the period in line 9, add the following:

"It makes no difference whether the notice is printed on the order blank or a tip-on is used. The percentage runs about the same." (Trans. p. 121.)

On page 58, following the word "order", in line 11, insert the following:

"because to withhold the order means slowing up the procedure and that fewer orders will be filled during the day, and the service to the customer will be impaired, which might lead to loss of business." (Trans. pp. 121, 122.)

On page 58, after the word "tax" appearing at the end of line 58, add the following:

"where Montgomery Ward has mail order houses." (Trans. p. 126.)

[fol. 143] On page 59, following the period in line 5, add the following:

"That system would be in addition to the system which is already in use in connection with the Illinois Retailers Occupational Tax." (Trans. p. 129.)

Earl Ryan, called and sworn, testified for the plaintiff, as follows:

Direct examination:

On page 59, following the period in line 25, add the following:

"None of them have been licensed to do business in Iowa." (Trans. p. 131.)

J. H. Schneider resumed the stand.

Direct examination:

On page 60, after the word "cost", in line 22, insert the following:

"of collecting per $10,000 of Iowa Use Tax" (Trans. p. 136).

On page 60, following the word "bills" in line 31, insert the following:

"for the Iowa Use Tax". (Trans. 138.)

On page 60, following the period in line 31, add the following:

"As manager of the tax department, I investigate the record and supervise the making of the record with respect to due bills. Based on my experience and studies in connection with the collection of the Illinois Retail Occupa-[fol. 144] tional Tax, and in other states, and in connection with the sales tax collections by other mail order houses in other states, it is my opinion that about 42% of the Iowa Use Tax could be collected by the Chicago mail order house." (Trans. p. 139.)

On page 60, after the period in line 34, add the following:

"The only possible method that could be used by Montgomery Ward to collect the Iowa Use Tax on sales made from its mail order houses direct to Iowa customers until the next catalog is issued, would be that of issuing due bills for all deficiencies. During this period, it would cost the company about $6,840 to collect $10,000 of Iowa Use Tax. The so-called due-bills are sent to the customers at the time the various items of merchandise are assembled, wrapped and packed in the billing department after the biller has determined the amount of the order." (Trans. pp. 140, 141.)

On page 60, strike the sentence beginning in line 34, and ending in line 1, on page 61, and substitute therefor the following:

"In my opinion, based upon by knowledge and experience and the studies I have made, if the tip-on or notice in the order blank were not used by Montgomery Ward & Company, the Iowa Use Tax could not be collected. From the inception of the Act until Montgomery Ward & Company started sending due-bills to its customers, the liability imposed on Montgomery Ward & Company would be 100% of the amount of the tax involved." (Trans. p. 143.)

[fol. 145] On page 61, after the word "Iowa", in line 5, insert the following:

"Use Tax and Illinois Retailers Occupational Tax" (Trans. p. 144).

On page 61, immediately before the word "tax," in line 7, insert the following:

"Iowa Sales" (Trans. p. 144).

On page 61, immediately before the word "cost" appearing in line 7, insert the word "direct". (Trans. p. 145.)

On page 61, strike the word "It" at the beginning of the sentence appearing in line 9, and insert, in lieu thereof, the following:

"The cost to Montgomery Ward & Company of collecting the Iowa Sales Tax" (Trans. p. 146).

On page 61, immediately after the period in line 14, add the following:

"The cost of collecting the sales tax or use tax in the mail order houses is greater than the cost of collecting either tax in a retail store." (Trans. p. 147.)

Cross-examination:

On page 61, after the period appearing in line 25, add the following:

"There are many many accounts carried on time payment, accounts carried in the mail order house in the credit department for some particular town where a store may be located, and there is no connection whatever in the collection of those accounts." (Trans. p. 149.)

[fol. 146] On page 61, after the period in line 29, add the following:

"It is not the practice of the company to refer its mail order accounts to the particular store located in the vicinity of the customer's residence, in those cases in which the ordinary collection letters and follow-ups fail to bring about the payment of the account." (Trans. pp. 150-151.)

On page 62, strike the word "not" appearing in line 17, and substitute therefor the word "now". (Trans. p. 151.)

CERTIFICATE OF RECORD

We hereby certify that the above and foregoing Appellee's Denial of and Amendment to Appellant's Abstract of Record, together with Appellant's Abstract of Record, comprise a full and complete abstract of record of all pleadings, evidence and testimony produced, the record made, and the proceedings had upon the trial of said case.

Parrish, Guthrie, Colflesh & O'Brien, Attorneys for Appellee.

NOTICE OF ORAL ARGUMENT

Notice is hereby given that counsel for appellee will ask to be heard orally upon the submission of this cause.

Parrish, Guthrie, Colflesh & O'Brien, Attorneys for Appellee.

[fols. 147-148] CERTIFICATE OF COST

We hereby certify that the cost of printing the above and foregoing Appellee's Denial of and Amendment to Appellant's Abstract of Record and Notice of Oral Argument was the sum of $26.00.

Parrish, Guthrie, Colflesh & O'Brien, Attorneys for Appellee.

[fols. 149-150] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 151] IN SUPREME COURT OF IOWA, SEPTEMBER TERM, 1939

Equity

MONTGOMERY WARD & Co., Incorporated, Appellee,

vs.

LOUIS E. RODDEWIG, D. L. MURROW, and C. F. GUBBE, Individually and as Members of the Iowa State Board of Assessment and Review, Appellants

Appeal from District Court of Polk County, Iowa, Honorable John J. Halloran, Judge

OPINION OF THE COURT—Rendered May 14, 1940

[fol. 152] Suit in equity to enjoin defendants, as members of the State Board of Assessment and Review, from undertaking to cancel plaintiff's permit to do business in Iowa for failure to pay a use tax on mail order sales and retail sales made by plaintiff outside of Iowa. The court granted the injunction. Defendants appeal. Affirmed.

MILLER, J.:

Some of the questions presented in this case are identical with those presented for our determination in the case of

Sears, Roebuck & Co. v. Roddewig, et al., — Iowa —, — N. W. —, decided at this term. The decree appealed from ordered the same type of an injunction as was involved in that case. For the reasons there stated, the decree must be affirmed in all particulars where the two cases are identical.

One question is presented by the record herein which was not presented in the Sears, Roebuck & Co. case. That question is whether the plaintiff can be required to collect the use tax on sales made in retail stores located near, but outside, the boundaries of the State of Iowa, some of which are located at Austin, Minnesota, Maryville, Missouri, Nebraska City, Nebraska, Sioux Falls, South Dakota, and Moline, Illinois, where the purchaser is a resident of Iowa and purchases the property for use in this state. The court enjoined the defendants from undertaking to require plaintiff to collect a use tax on such sales. The position there taken by us in the Sears, Roebuck & Co. case demonstrates that the action of the court was right.

Accordingly, the decree appealed from, in all of its particulars, must be and it is—Affirmed.

Sager, Hale, Bliss and Oliver concur.

Hamilton, C. J., Mitchell, Richards and Stiger, J. J., dissent.

[fol. 153] DISSENTING OPINION

Hamilton, C. J., dissents:

Being unable to agree with the majority opinion in so far as it pertains to mail order business, I respectfully dissent. My views are expressed in my dissenting opinion filed in the companion case, Sears, Roebuck & Company v. Louis E. Roddewig, et al., opinion in which case was handed down at this period of our court, — N. W. —.

There is, however, still another type of business carried on by appellee herein which was not involved or presented by the record in the Sears, Roebuck & Company case, and which is of little consequence, yet, under the issues, requires consideration and determination, namely, business or sales made direct to Iowa customers by appellee in its stores located near, but outside, the boundaries of the State of Iowa, some of which are located at Austin, Minnesota, Maryville, Missouri, Nebraska City, Nebraska, Sioux Falls, South Dakota, and Moline, Illinois. The quantity of business transacted by appellee with Iowa customers at these various

stores is not found in the record, but, of course, is inconsequential as compared with "mail order business". Some of these sales are made direct and are over-the-counter transactions and, as to such sales, the appellee has no feasable way of knowing or ascertaining where the customer lives or where he is going to make use of the merchandise purchased. A person living in Iowa might purchase articles for use in Iowa from the stores located out of the state named above or at some of appellee's stores located in any state in the Union; the user in Iowa would, of course, be liable for the tax, but to require the appellee to know or ascertain, and segregate from its millions of customers which ones were from Iowa and require appellee to collect and remit the tax on such sales is to impose upon appellee an almost impossible task and imposes upon the seller a burden so unreasonable, arbitrary and capricious as to in-
[fol. 154] vade its constitutional rights under the due process clause of the Federal Constitution and, therefore, requires the court to hold that, as to such sales, the regulatory requirements of the Use Tax Act, requiring the seller to collect the tax, is invalid and, hence, not enforceable against appellee, and, in this respect and as to such sales, the restraining order of the trial court should be upheld, but, in all other respects, the decree of the trial court should, we think, be reversed.

Stiger and Richards, J. J., join in dissent.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 155] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Iowa is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Stone and Mr. Justice Roberts took no part in the consideration and decision of this application.